

## **EXECUTIVE PERSONNEL POLICY MANUAL**

This manual sets forth Departmental policies that govern the management of executive personnel who are in positions above the grade 15 or equivalent, regardless of pay plan. Positions filled by an appointment by the President, by and with the advice and consent of the Senate, are excluded.

The manual identifies those authorities delegated by the Chair, Executive Resources Board to the Secretarial Officers to manage executive personnel. These delegated authorities are reserved to the Secretarial Officers and may not be redelegated unless so specifically stated in the Manual.

This manual is based on the executive personnel provisions of Public Law 95-454 (Civil Service Reform Act) as codified in Title 5, U. S. Code, directions from the Office of Personnel Management, the Executive Personnel Delegation Performance Agreement between the Office of Personnel Management and the Department of Commerce, approved on 4/19/79 and extended indefinitely on 9/27/79. The contents of this manual supersede all previously issued Executive Resources Board Bulletins, policies and procedures in the Department of Commerce.

The Director for Human Resources Management shall be responsible for modifications and revisions to this Manual as approved by the Executive Resources Board.

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Director, Office of Human Resources Management

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Chair, Executive Resources Board

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## CHAPTER 1. EXECUTIVE RESOURCES BOARDS

### 1.1 DEPARTMENTAL EXECUTIVE RESOURCES BOARD

- A. The Departmental Executive Resources Board (DERB) consists of three members and is chaired by the Deputy Secretary of Commerce. The Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA) shall serve as Vice Chair and the third member will be the Chief of Staff. The noncareer senior executive who chairs the Diversity Council shall serve as advisor. The Director, Office of Human Resources Management (OHRM) shall serve as the Executive Secretary to the DERB.
- B. The DERB is responsible for establishing the policies and procedures to manage the Department's executive resources which include positions above the grade 15 or equivalent, regardless of pay plan, i.e., Senior Executive Service (SES); Scientific and Professional (ST-3104); Senior-level (former Supergrade); and Administratively Determined (AD). **Exceptions to this are positions filled by an appointment by the President, by and with the advice and consent of the Senate (PAS), NIST Personnel Demonstration Project positions above the grade 15 or equivalent, and Foreign Service positions.**
- C. Executive resource policies are approved by the Chair, DERB, and issued in the Executive Personnel Policy Manual.

### 1.2 OPERATING UNIT EXECUTIVE RESOURCES BOARD

The following organizations shall establish an Operating Unit Executive Resources Board (OERB) which shall perform the responsibilities outlined in Appendix, Section 1, of this Manual:

- (1) Office of the Secretary\*
- (2) Economics and Statistics Administration\*\*
- (3) Technology Administration \*\*\*
- (4) Economic Development Administration
- (5) Office of Inspector General

- (6) International Trade Administration
- (7) National Oceanic and Atmospheric Administration
- (8) Patent and Trademark Office
- (9) Bureau of Export Administration
- (10) National Telecommunications and Information Administration

\* Includes, for the purposes of this Manual, all of the components in the Office of the Secretary, the Office of the General Counsel, the Minority Business Development Agency, the Office of Administration, as well as the Immediate Office of the Secretary.

\*\* Includes the Office of Policy Development, Office of Business and Industrial Analysis, Office of the Chief Economist, the Bureau of Economic Analysis and the Bureau of the Census.

\*\*\* Includes the Office of the Under Secretary for Technology, the Assistant Secretary for Technology Policy, the National Technical Information Service, and the National Institute of Standards and Technology.

- A. Each OERB shall develop a written charter which outlines the specific functions and procedures to be performed. The Secretarial Officer will submit the proposed charter to the Chair, DERB, through the Director, Office of Human Resources Management for final approval.
- B. Each OERB shall have a minimum of three members appointed by the Secretarial Officer who shall designate one member to serve as Chair. The names of the members shall be submitted to the Chair, DERB, through the Director, Office of Human Resources Management.

### **1.3 SENIOR FOREIGN SERVICE**

For the Senior Foreign Service, the functions of the OERB are performed by the Senior Selection Board and by the US&FCS Assignments Panel as prescribed by the Foreign Service Act of 1980 and Personnel Bulletin 430-4 (Revision No. 2), Precepts for the Foreign Service Selection.

### **1.4 NOAA COMMISSIONED CORPS**

Unless specifically stated, members of the NOAA Commissioned Corps are excluded from coverage by this Manual. Policies governing the Commissioned Corps can be found in NOAA Directives Manual 56-45.

## **CHAPTER 2. DELEGATIONS OF AUTHORITIES**

### **2.1 THE DEPUTY SECRETARY**

The Deputy Secretary, as Chair, DERB, serves as the adjudicating authority on executive personnel actions at the request of Secretarial Officers.

### **2.2 THE DEPARTMENTAL EXECUTIVE RESOURCES BOARD**

The DERB makes decisions on personnel actions associated with the end of the performance cycle. These include:

- A. Performance ratings.
- B. Pay level adjustments.
- C. Bonuses.
- D. Salary adjustments.
- E. Presidential Rank Awards.
- F. Recertification.

### **2.3 THE CHIEF FINANCIAL OFFICER AND ASSISTANT SECRETARY FOR ADMINISTRATION**

The Chair, DERB, delegates approval authority to the Chief Financial Officer and Assistant Secretary for Administration for the following:

- A. Executive classification and designation of executive positions.
- B. Appointment to executive positions.
- C. SES pay rate level and salary level for executive positions.
- D. Involuntary reassignments to executive positions.
- E. Details of executives to unclassified positions.

- F. Executive ceiling allocations.
- G. Use of noncareer appointment authorities.
- H. Intergovernmental personnel agreements for executive appointees.
- I. Positive recertification decisions.

## **2.4 SECRETARIAL OFFICERS/APPOINTING AUTHORITIES**

For the purposes of this Manual, the following list constitutes those positions which meet the definition of "Appointing Authority" (See DAO 202-250, Delegation of Authority for Human Resources Management, Section 2.b.)

- (1) Chief of Staff (for all offices in the immediate Office of the Secretary)
- (2) General Counsel
- (3) Chief Financial Officer and Assistant Secretary for Administration
- (4) Under Secretary for Economics and Statistics Administration
- (5) Assistant Secretary for Communications and Information
- (6) Assistant Secretary for Economic Development
- (7) Inspector General
- (8) Under Secretary for International Trade
- (9) Under Secretary for Oceans and Atmosphere
- (10) Assistant Secretary and Commissioner, Patent and Trademark Office
- (11) Under Secretary for Export Administration
- (12) Under Secretary for Technology

The Chair, DERB, delegates to the Secretarial Officers (Appointing Authorities) the authority to approve the following executive personnel actions:

- A. Resignations and retirements of executive employees.

- B. Proposals or decisions on adverse actions.
- C. Furlough of SES appointees.
- D. Removal of an SES appointee during and after the probation period when such removal is performance related.
- E. Details and reassignments of executives to established SES positions within the Appointing Authority's area of responsibility. (This does not apply to movement from one bureau to another.)

The Principal Human Resources Manager or designee serves in an advisory capacity as Executive Secretary to the OERB.

All other actions affecting SES employees or positions, except those covered by paragraph 2.7, require approval from the Office of the Secretary before any commitment or announcement may be made.

Appointing Authorities who report through higher level Secretarial Officers (e.g., within Technology Administration or Economics and Statistics Administration) will be responsible for clearing any executive personnel action with the senior Secretarial Officer who will request Office of the Secretary approvals as necessary for SES activity within his/her operating unit.

## **2.5 CHAIRS, OPERATING UNIT EXECUTIVE RESOURCES BOARDS**

The Chair, DERB, delegates to the Chairs, OERB's, the authority to approve the following:

- A. Qualifications Standards for executive positions.
- B. Management development of SES appointees and candidates.

## **2.6 DIRECTOR, OFFICE OF HUMAN RESOURCES MANAGEMENT**

The Chair, DERB, delegates to the Director, Office of Human Resources Management through the CFO/ASA the authority to approve the following:

- A. Recruitment plans for executive positions.
- B. Details of grade 15 employees to executive positions.



- C. Executive development programs.
- D. OERB/PRB Charters.
- E. Resignations.
- F. Abolishment of positions.
- G. Changes in titles.

## **2.7 INSPECTOR GENERAL**

The Inspector General Act Amendments of 1988 (P.L. 100-504) expanded the authority of the Inspector General to take the following actions for Senior Executive Service members:

- A. Select and appoint individuals to SES positions within the Office of the Inspector General.
- B. Fix the rate of pay under Section 5383 of Title 5 for senior executives appointed by the Inspector General.
- C. Appraise the performance of senior executives under Section 4314 of Title 5.
- D. Remove senior executives because of poor performance under Section 3592 of Title 5.
- E. Authority to discipline senior executives because of conduct pursuant to 5 U.S.C. § 7542.
- F. Recruitment for executive positions.
- G. Detail of non-SES employees to an executive position.
- H. Approve sabbaticals for SES employees.
- I. Accept resignations of SES employees.

These authorities should be implemented through applicable Department policy regarding executive level positions with copies of actions processed provided to the Director, Office of Human Resources Management who maintains consolidated Department records.

## **CHAPTER 3. EXECUTIVE POSITION MANAGEMENT**

### **3.1 RESPONSIBILITIES**

Appointing Authorities are responsible for developing and implementing an effective position management system which as a minimum: delegates authority and responsibility for executive position management; ensures that vacant executive positions are filled in a timely manner; and measures executive position management effectiveness towards mission objectives.

### **3.2 REORGANIZATIONS/NEW POSITION REQUESTS**

Appointing Authorities or their designees will consult with the Director, Office of Human Resources Management and the Office of Budget, Management and Information on proposed organization changes which will affect the functions performed by executive personnel. This joint consultation process should take place before any formal submission to the Department. The Appointing Authority or designee will provide a “cross walk” of executive positions showing placement from the current to the proposed reorganization. Discussions shall include but not be limited to, program functional statements, staffing structure and draft position descriptions for the affected executive personnel.

### **3.3 SES VACANCY RECRUITMENT ACTIONS**

Initial career SES appointments must be submitted to OPM for Qualifications Review Board approval within nine months from the closing date of the vacancy announcement. Otherwise, the agency must issue a new vacancy announcement and repeat the competitive selection process.

### **3.4 USE OF SES SPACES**

SES ceiling spaces may not be used to establish part-time or intermittent positions.

## CHAPTER 4. STAFFING EXECUTIVE POSITIONS

### 4.1 RECRUITMENT PROCEDURES

- A. The Director, Office of Human Resources Management is responsible for approving operating unit executive recruitment plans.
- B. Each request for recruitment must be submitted to the Office of Human Resources Management with the following documentation:
  - (1) OPM Form 1390. When a position is established or redescribed.
  - (2) Position Description. The original with signed classification evaluation statement.
  - (3) Qualification Standard. The original approved by the Chair, OERB. (See Appendix, Section 2, for further guidance on the Development of Qualifications Standards.)
  - (4) Vacancy Announcement. Final version.
  - (5) Rating Plan. Must include the factors to be used to rate/rank applicants and the elements which will be considered in determining whether the applicant is not qualified, qualified, well qualified, or highly qualified (ascending rank order). (See Appendix, Section 4.)
  - (6) Area of Consideration. A statement that the operating unit will use OPM's distribution system. Please indicate if additional sources will be used, such as paid advertisement, colleges and universities.
- C. Upon approval, the Office of Human Resources Management will notify the operating unit's human resources management office. The operating unit's human resources management office will provide OHRM with the announcement number and the opening and closing dates and enter the announcement in the Federal Job Opportunities Board. (See Appendix, Section 3.)
- D. An agency may make a noncompetitive noncareer or limited appointment. The appointee, however, must meet the qualifications requirements for the position, as determined in writing by the appointing authority.

## **4.2 SELECTION PROCEDURES**

- A. The Chairperson, OERB, must:
  - (1) Convene the Board to rate and rank applicants; or
  - (2) Appoint a screening panel of SES or equivalent subject matter specialists who will rate and rank applicants.
- B. The OERB or screening panel shall rate and rank the qualifications of each qualified applicant. The written recommendations, as a minimum, will rate the applicants into three categories: Qualified, Well Qualified, and Highly Qualified. The OERB screening panel shall prepare a summary rating of qualifications of each applicant. If differences cannot be resolved, the Human Resources Manager will be responsible for resolving them.
- C. A list of all qualified applicants shall be submitted to the interviewing official. The best qualified candidates, however, are to be identified on the list. Upon tentative selection, the interviewing official shall forward the list to the appointing authority for selection. Selection must be made from the best qualified group. (For guidance on selection procedures, see Appendix, Section 4.)
- D. The executive/managerial qualifications of a proposed career SES appointee must be approved by an OPM Qualifications Review Board (QRB) before the operating unit may appoint the individual (5 USC 3393). Operating units are cautioned NOT to make any offer of employment, or what could appear to be an offer of employment, to the proposed appointee, until the QRB approval has been obtained.
- E. Operating units must keep records for two years after a competitive vacancy is filled (or until an OPM inspection, whichever occurs first) to allow reconstruction of each competitive action. (For further information, see Appendix, Section 4.)

## **4.3 PROCEDURES FOR REQUESTING APPROVAL**

- A. Approval Document - OPM Form 1390
  - (1) OPM Form 1390 is required for all executive appointment approval requests and must include citations in the Remarks Section as follows:

- (a) The statement "I approve the appointment of (Name of Appointee) to the executive position of (Title)" should appear on initial appointments, noncareer appointments, limited appointments, reassignments, transfers and reinstatements.
- (b) If an individual is selected for initial appointment as a career SES appointee one of the following three citations must be included:
  - o 5 USC 3393(c)(2)(A) Demonstrated Executive Experience
  - o 5 USC 3393(c)(2)(B) Completion of Executive Development Program
  - o 5 USC 3393(c)(2)(C) Special, Unique Qualifications (Potential)
- (c) The office address and work telephone number must be included whenever a name is entered in the 1390.
- (d) The vacancy announcement closing date must be included on all initial appointments of career appointees.

B. Qualifications Standard

See Appendix, Section 2, Guidelines for Developing and Establishing Qualifications Standards, for assistance in developing a standard.

C. Certification Statement

The Chair, OERB must sign a statement that the proposed appointee or candidate's qualifications meet those managerial and technical qualifications contained in the Qualifications Standard and that merit staffing procedures were followed.

D. Qualifications Analysis

- (1) The selection of an individual for initial appointment as a career SES must be based on one of the three citations listed below.
  - (a) 5 USC 3393(c)(2)(A), Demonstrated Executive Experience. The

proposed appointee's managerial qualifications as analyzed against the five executive core qualifications (ECQ) and technical qualifications.

- (b) 5 USC 3393(c)(2)(B), Completion of Executive Development Program. The proposed appointee has completed an OPM approved SES candidate development program. The Individual Development Plan (IDP) links the completed developmental activities to the five ECQ's. The Chair, OERB, must sign a letter certifying that: (1) the OERB has reviewed the graduate's performance during the program and approves the submission; (2) the individual has successfully completed all scheduled activities in the IDP; and (3) participation in the DOC Executive Forum is encouraged.

- (c) 5 USC 3393(c)(2)(C), Special Unique Qualifications (Potential). State the appointee's managerial qualifications, the formal managerial developmental activities planned during the probationary period, and references on the appointee's executive potential using the five ECQ's listed in the Qualifications Standard.
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- (2) Cases meeting criteria *a* and *c* must be presented to the QRB within nine months of the closing date of the vacancy announcement. Criteria *b* cases must be submitted within nine months from the date the candidate completes the development program.

E. SF-171 or Resume and OF-612

The appointee must complete an SF-171 or resume and OF-612. The information contained in the SF-171 or resume and OF-612 must agree with the information contained in the qualifications analysis.

F. References

Although OPM only requires references (written around the five executive core qualifications in the Qualifications Standard) for the proposed appointee in Criterion *c* cases, proposed appointees may submit references to illuminate their records of achievement.

G. Biography

See Section 4.7.

H. Transmittal

Memorandum to the Director, Office of Human Resources Management, explaining any relevant relationships of the request to other pending or established positions, the source of the SES space, disposition of any vacated SES position, status of security action pending or completed for the incumbent and any other significant information that would aid in establishing and clearing the request.

**4.4 SES NONCOMPETITIVE APPOINTMENTS**

A. Reassignment

- (1) An SES appointee may be noncompetitively reassigned to fill any vacant SES position in the Department if the appointee meets the technical qualifications established for the position. Only career appointees, however, are eligible for reassignment into career reserved positions.
- (2) A noncareer SES appointee may only be reassigned with the prior approval of OPM.
- (3) A career SES appointee may be reassigned to any Departmental SES position within the commuting area if the appointee receives a written notice at least 15 days in advance of the reassignment. The appointee may waive in writing the advanced notification requirement. Failure to accept a reassignment within the commuting area shall result in an involuntary separation.
- (4) A career SES appointee may be reassigned to any SES position outside the commuting area within the Department provided the operating unit has:
  - (a) consulted with the appointee on the reasons for the reassignment;
  - (b) obtained the appointee's preferences to the reassignment;
  - (c) provided the appointee a written letter with the specific reasons for the reassignment at least 60 days in advance of the proposed effective date.

The career appointee may waive in writing the advance notification



requirement. Failure to accept a directed reassignment outside of the commuting area shall result in an involuntary separation.

- (5) SES reassignments, other than those involving OIG SES employees, may involve a two step process. The first step involves the Appointing Authority proposing the reassignment. If the SES appointee agrees, the reassignment action is processed through normal channels. If the appointee declines, the Appointing Authority may request that the CFO/ASA issue a letter of directed reassignment to the appointee.
- (6) Involuntary reassignments may not be made within 120 days after the appointment of a new Secretary, or within 120 days after the appointment of a new noncareer supervisor who has the authority to make the initial performance appraisal of the career appointee. A 15 or 60-day advance notice described in paragraph (3) and (4) of this section may be issued during the 120-day moratorium on the involuntary reassignment of a career appointee, but an involuntary reassignment may not be effected until the moratorium has ended.
- (7) The limitations set forth in subparagraph (5) do not apply if the reassignment is in connection with an unsatisfactory performance rating or a disciplinary action initiated before an appointment referred to above.

B. Reinstatement

- (1) Career appointees who leave the SES after having successfully completed the one year probationary period are eligible for reinstatement to any SES position for which they are technically qualified. Appointees initially converted to the SES without the requirement of serving a probationary period are also eligible for reinstatement to the SES. An appointing authority may set the pay of a former senior executive at any ES rate upon reappointment to the SES under the conditions specified in 5 CFR 534.401. Persons cannot be reinstated when they left the SES for less than fully successful performance or for reasons of misconduct, neglect of duty, or malfeasance, or for national security reasons or by order of the Merit Systems Protection Board upon the recommendation of the Special Counsel or resignation to avoid such an action. Former SES career appointees who were appointed by the President to a civil service position outside the SES without a break in service, and who leave the Presidential appointment for reasons other than misconduct, neglect of duty or malfeasance, are entitled to placement as career SES appointees. If

individuals retained SES pay benefits during the Presidential appointment, reinstatement must be at the current pay rate if an adjustment has been made within the previous 12 months.

- (2) Reinstatement eligibility acquired in non-SES competitive service is limited to such positions and is not transferable to the SES. Similarly, persons in, or who were in, the excepted service cannot be reinstated to the SES based on their employment in the excepted service. The SES is a separate personnel system with its own statutory requirements.
- (3) Applicants with reinstatement eligibility must meet the technical qualifications of the SES position.

C. Reemployed Annuitants

- (1) A person who retires from the SES with career status may be reemployed as an annuitant with appropriate limitations on tenure and compensation.
- (2) A reemployed annuitant is:
  - (a) Eligible for appointment to either an SES general or career reserved position.
  - (b) Considered a "reinstatement-SES career," serving at the pleasure of the Appointing Authority.
  - (c) Compensated in the same manner as a reemployed annuitant in the General Schedule.
  - (d) Eligible to receive SES performance awards, if serving in an SES career appointment, in accordance with policies and procedures governing such awards.

D. SES Candidate Development Program

- (1) An individual who successfully completes an SES candidate development program which was approved by OPM may be selected for an SES position without further competition provided that initial competition into the approved SES candidate development program was in accordance with the SES merit staffing procedures prescribed by OPM regulations.

- (2) Certification of the individual's executive qualifications by an OPM Qualifications Review Board normally occurs after successful completion of the development program.
- (3) Information on the Department's candidate development program is found in Appendix, Section 8.

E. Interchange Agreements

- (1) OPM and any agency with an executive personnel system essentially equivalent to the SES may enter into an agreement providing for the movement of persons between the SES and the other system. The agreement shall define the status and tenure that the persons affected shall acquire upon the movement.
- (2) Persons eligible for movement must be serving in permanent, continuing positions with career or career-type appointments.
- (3) An interchange agreement may be discontinued by either party under such conditions as provided in the agreement.

**4.5 TRANSFER OF FUNCTIONS**

- A. A career appointee affected by a transfer of function between agencies has rights comparable to a competitive service employee, and is entitled to accompany the function if the alternative would be removal from the SES.
- B. A career appointee who fails to accompany a transfer of function may be removed from the SES. As an alternative to removal, the losing agency may reassign the appointee to another SES position in a different function.

**4.6 DETAILS**

A. SES Appointees

- (1) Appointing Authorities are delegated the authority to detail SES appointees to established SES positions within their operating unit. All other details of SES appointees including, Intergovernmental Personnel Act, Exchange Programs, details of SES employees from other agencies into Commerce, etc., must be approved by the CFO/ASA on Form 1390 and accompanied by a narrative justification and current SF-171 or resume

and OF-612.

- (2) An SES appointee may not be detailed into an established GS-15 or lower graded position, a senior-level position, an Administratively determined position, or a Scientific and Professional position (ST-3104). The SES is a distinct personnel system which is not interchangeable with other personnel systems.
- (3) An SES appointee may be detailed to an unclassified or unestablished position up to 240 days. OPM regulation prohibits extension beyond 240 days. The initial appointment cannot exceed 120 days with a second appointment up to another 120 days.
- (4) Requests requiring approval by the CFO/ASA must be accompanied by narrative justification and a Form 1390 with beginning and ending dates of the detail.
- (5) An SES noncareer appointee may not be detailed to a career reserved SES position.

**B. Non-SES Appointees**

- (1) A request to detail a non-SES employee to an SES position must be submitted to the Director, Office of Human Resources Management, and include a justification, Form 1390, a current SF-171/resume and OF-612, and an SF-52.
- (2) Approved details are limited to 240 days and may only be extended if there is adequate justification, and competitive merit promotion procedures have been followed.

**4.7 EXECUTIVE BIOGRAPHY**

- A. A one-page biography is required for Presidential appointees and each senior executive who occupies a position which is classified above the GS-15. (See Appendix, Section 14, for a sample format.)
- B. Biographies must be included as part of the executive submissions for:
  - (1) proposed appointments;

- (2) reassignments (updated to reflect new position);
  - (3) transfer into the operating unit.
- C. The executive position's ceiling space control number shall be recorded in the lower right corner of the biography.

#### **4.8 FOREIGN SERVICE OFFICERS**

- (1) When a Senior Foreign Service Officer is to be assigned or detailed to a current or former executive position in the United States, the Office of Foreign Service Personnel will coordinate with the appropriate operating unit personnel office to ensure the position is available.
- (2) The Office of Foreign Service Personnel, with the concurrence of the Principal Human Resources Manager for the gaining operating unit, shall develop the necessary documentation (justification, Form 1390, SF-171/resume and OF-612). The proposed action shall be submitted to the CFO/ASA for approval in accordance with established SES procedures.

#### **4.9 NOAA COMMISSIONED CORPS OFFICERS**

- A. The CFO/ASA shall be the Approving Authority for the following personnel actions concerning NOAA Commissioned Corps Officers:

The assignment, detail or request for extension of detail of any NOAA Commissioned Corps Officer to any executive, proposed executive, or former executive position located outside the organizational boundaries of the NOAA Corps.

- B. The approval document will be the OPM Form 1390.

## **CHAPTER 5. ADMINISTRATION OF EXECUTIVE PAY**

### **5.1 CIVIL SERVICE REFORM ACT REGULATIONS**

- A. The aggregate amount received by a senior executive during any calendar year for basic pay, in combination with any allowance, differential, bonus, award, or similar cash payment, may not exceed the annual rate payable for positions at Level I of the Executive Schedule. If the senior executive receives a rank award or performance award and his/her aggregate salary exceeds Level I salary, the award amount in excess of Executive Level I, will be paid at the beginning of the next calendar year.
- B. The rate of basic pay may not be adjusted up or down more than once during any 12-month period. Initial appointment into SES is a pay rate adjustment. That appointee's pay rate level may not be adjusted until after the 12-month period.
- C. A senior executive's basic pay may not be reduced by more than one level in any 12-month period, and normally only as a result of performance or disciplinary action. It may not be reduced below the rate payable on the senior executive's initial conversion into SES.
- D. If the pay reduction is for performance reasons, the agency shall provide the executive at least 15 days of advance written notice. If the pay reduction is for disciplinary reasons, the agency shall provide the executive at least 30 days' advance written notice.

### **5.2 ALTERNATIVE WORK SCHEDULES (AWS)**

- A. Senior Executive Service appointees may participate in AWS programs subject to the approval of the operating unit Appointing Authority, and consistent with program requirements.
- B. Senior Executive Service (or equivalent) employees may not earn or use credit hours.
- C. Since SES members are not eligible for overtime pay, they also are not eligible for compensatory time in lieu of overtime pay for work performed as an SES member. They are eligible, however, for compensatory time off for religious purposes when their personal religious beliefs require the abstention from work during certain periods of time. To the extent that such modifications in work

schedules do not interfere with the efficient accomplishment of an agency's mission, employees shall be afforded the opportunity to work compensatory overtime for time lost for meeting those religious requirements.

### **5.3 EXECUTIVE SALARY DETERMINATION**

#### **A. Senior Executive Service**

- (1) Any employee initially appointed to an SES position shall be compensated at ES-1 or a level which represents an increase of no more than 6% over the individual's current salary rate.

Consider the following criteria:

- o alignment with other positions and incumbents with comparable responsibilities and qualifications;
  - o recent salary history (previous 2-3 years);
  - o current base salary (including any recurring payments that are routinely considered part of base compensation);
  - o any other unique characteristics of the incumbent and/or position under review (e.g., difficulty in filling the position; geographic differential for GS positions in the same area; use of a recruitment bonus).
- (2) Requests for pay increases over 6% and for appointments to the ES-4, 5 or 6 level must be justified in writing by the Appointing Authority.

#### **B. Senior-Level and Related Pay Systems**

This section reflects Department policy for implementing provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA) primarily affecting positions previously at, or the equivalent of, grades GS-16, 17, and 18. These include former supergrade (SL) positions, administratively determined (AD) positions in the Patent and Trademark Office, and scientific and professional (ST) positions.

(1) Legal/Regulatory Requirements:

- o Minimum pay is 120% of GS-15, Step 1.
- o Maximum pay is Executive Level IV.
- o Increases in pay under these provisions may not be made retroactive, and must be approved by the agency head or designee.
- o Only 1 adjustment in pay may be made in a 12 month period.

(2) Policy Requirements:

- o Pay for ST, SL, and AD positions will normally be set at any dollar amount within the following two pay ranges:
  - Former GS-16 positions and equivalents (NIST ST-3104 Fellow; PTO Attorney-Examiner; GS-16 supergrades) = 120% of GS-15 step 1 up to ES-3.
  - Former GS-17 positions and equivalents (NIST ST-3104 Senior Fellow; PTO Examiner-in-Chief; supergrades above GS-16) = 135% of GS-15 step 1 up to ES-4.
- o Requests to set pay above ES-4 will be considered in unusual situations where the position is especially important to the Department and/or the qualifications of the individual are unusually high.

[These pay levels are summarized in a Senior Pay Table distributed annually by the Office of Human Resources Management.]

- o Consistent with SES pay setting policy, initial appointments to either of the above pay ranges should represent a 6% or smaller increase over current salary and consider such elements as listed in Section 5.3 A. (1) above.
- o Initial pay setting proposals should include an analysis using the above criteria when appointment packages (including Form 1390) are submitted to the Director, Office of Human Resources Management. As with SES cases, the final approval authority for



all senior positions is vested with the CFO/ASA. No commitments on pay setting should be made until approval is received from the Office of the Secretary through the Director, Office of Human Resources Management.

- o Adjustments to pay for these employees will be considered at the end of the FY performance rating cycle. Adjustment recommendations should be reviewed by the operating unit performance review board, endorsed by the senior operating unit Appointing Authority, and be based on such criteria as changes in position responsibilities, personal performance and length of service, and increased professional stature. They may be effected only once in a 12-month period.
- o Final approval of these adjustments will be subject to Departmental Executive Resources Board (DERB) deliberations and will not exceed 4% of an individual's base salary.
- o Request for adjustments with brief narrative justification must be submitted to the DERB at the same time as SES bonus and pay rate adjustment requests.

All future salary adjustment requests, or performance-related adjustments must also be submitted to the CFO/ASA using the OPM Form 1390 as the approval document.

Operating units wishing to supplement these provisions should submit proposed documentation to the Director for Human Resources Management for approval.

\_\_\_\_\_ (3) Critical Pay:

- o FEPCA authorizes up to 800 critical positions governmentwide. Basic pay for these positions may not exceed the rate payable for Executive Level I, except upon written approval of the President.
- o Requests should be submitted to the Director, Office of Human Resources Management from the senior operating unit Appointing Authority and include all information required by OMB Bulletin No. 91-09 dated March 7, 1991.
- o This authority is to be requested only when alternative means of

recruiting or retention of exceptionally well qualified individuals are unsuccessful.

#### **5.4 SES PERFORMANCE RELATED PAY ADJUSTMENTS**

- A. The following are guidelines to be followed when recommending an SES pay rate level adjustment based on performance.
  - (1) The senior executive's current performance rating is at least Commendable, and the senior executive has had performance ratings of at least Commendable for the past two years.
  - (2) Each performance element identified as critical in the senior executive's current performance plan received an element rating of at least 4.
  - (3) The senior executive has not had an SES rate level increase or decrease during the past 12 months.
  - (4) The senior executive did not receive a bonus during the same performance rating cycle.
- B. All recommendations for performance related upward pay rate level adjustments, with the exception of OIG employees, must be submitted to the CFO/ASA through the Director, Office of Human Resources Management, as spelled out in annual guidance provided by the Office of the Secretary. Recommendation actions should include:
  - (1) OPM Form 1390,
  - (2) Senior executive's current performance appraisal and rating,
  - (3) PRB's approval of the recommendation, and
  - (4) A priority order listing of nominees.
- C. Performance related pay level adjustments are limited to a one level increase.
- D. Decisions concerning performance related downward pay rate level adjustments are limited to a one level decrease and will be made at the discretion of the Appointing Authority, with prior discussions with the Director, Office of Human Resources Management. The basis for a downward pay level adjustment includes

receipt of a less than fully successful performance rating or failure to be recertified or conditionally recertified pursuant to 5 C.F.R. § 317.504. The Appointing Authority must provide the senior executive at least 15 days advance written notice.

- E. Downward pay level adjustments may also occur with disciplinary actions resulting from conduct-related activities, e.g., misconduct, neglect of duty, or malfeasance. Any such action must be coordinated with the Director, Office of Human Resources Management and the Office of General Counsel.

## **5.5 SES PAY ADJUSTMENTS BASED ON INCREASED RESPONSIBILITY**

Heads of operating units may recommend an SES appointee, who has not had an adjustment during the preceding 12 months for a pay rate level adjustment. Recommendations, except those for OIG employees, must be made to the CFO/ASA through the Director, Office of Human Resources Management. Justification must specifically address (1) or (2) below.

- (1) The senior executive is reassigned to a position where the managerial authority and technical qualification requirements clearly exceed those requirements of the predecessor position; or
- (2) The levels of authority and responsibility have significantly expanded in the existing position by the addition of new programs and increases in budget and personnel resulting from legislation, new initiatives and/or reorganizations.

## **5.6 PAY FOR CAREER APPOINTEES REMOVED FROM THE SES**

A career appointee who, for reasons other than misconduct, neglect of duty, or malfeasance or national security reasons or by action of the Merit Systems Protection Board upon recommendation of the Special Counsel, is removed from the SES during the probationary period; after completing the probationary period and for less than fully successful executive performance; or as a result of a reduction in force; shall be entitled to be placed in a civil service position (other than an SES position) which shall be a continuing position at GS-15 or above of the General Schedule if the appointee is eligible for reinstatement.

- (1) Any career appointee placed under the above provisions shall be entitled to receive basic pay at the highest of:

- (a) The rate of basic pay in effect for the position in which placed;
  - (b) The rate of basic pay in effect at the time of the placement for the position the career appointee held in the civil service immediately before being appointed to the SES; or
  - (c) The rate of basic pay in effect for the career appointee immediately before being removed from the SES position.
- (2) An appointee who is receiving basic pay under paragraph (1)(b) or (c) is entitled to have the basic pay rate increased by 50 percent of the amount of each statutory increase in the maximum rate of basic pay for the grade of the position in which the employee is placed until the rate is equal to the rate in effect under paragraph (1) (a) for the position in which the employee is placed.
- (3) Pay received under this section shall terminate if:
  - (a) The employee has a break in service of 1 workday or more; or
  - (b) The employee is demoted based on conduct or unacceptable performance or at the employee's request.

## **5.7 RETENTION OF SES PROVISIONS**

- A. If a career appointee is appointed by the President, by and with the advice and consent of the Senate, to a civilian position in the executive branch which is not in the SES, and the rate of basic pay payable which is equal to or greater than the rate payable for Level V of the Executive Schedule, the career appointee may elect to retain in writing some, all, or none of the following SES provisions: basic pay, performance awards, awarding of rank, severance pay, leave, and retirement. This will apply as if the career appointee remained in the SES career position from which he/she was appointed. This election shall remain in effect for no less than one year, unless the appointee leaves the position sooner.
- B. A career appointee, appointed under provisions of Section 5.6A, is permitted to make an election for purposes of adding or dropping coverage no more than once during any twelve-month period.
- C. The Appointing Authority is responsible for advising the appointee of the election opportunity. The election decision must be in writing.

- D. If the appointee elects to retain SES basic pay, the appointee is entitled to receive locality-based comparability payments if such pay is applicable to SES employees in the locality pay area, and any applicable special pay adjustment for a law enforcement officer even though the appointee may be in an Executive Schedule position otherwise excluded from such payment.
- E. A career executive appointed under provisions of Section 5.6A who is reinstated in the SES following termination of the Executive Schedule assignment will normally retain the SES pay level he/she elected to retain while on the ES assignment.

## **5.8 AGGREGATE COMPENSATION LIMITATION**

In accordance with 5 U.S.C. 5307, the aggregate compensation of SES, ST, and SL employees during a calendar year may not exceed the rate payable for Level I of the Executive Schedule on the last day of that calendar year. This limitation is applied on a calendar year basis and in addition to base pay, performance awards, rank awards, and comparability allowances, it also covers incentive awards, recruitment and relocation bonuses, retention allowances, and other forms of compensation.

## **CHAPTER 6. CLASSIFICATION OF SENIOR EXECUTIVE POSITIONS**

### **6.1 SENIOR EXECUTIVE POSITION**

A position is designated as senior executive when the duties and responsibilities are classifiable above the grade 15 level. Within the Department of Commerce, such positions fall into four categories: Senior Executive Service (SES), Senior-Level (SL), Scientific and Professional (ST-3104), and Administratively Determined (AD).

### **6.2 POSITION DESCRIPTION**

Senior executive positions will be described in narrative and as a minimum, include four basic areas:

- (1) Introduction. Includes information on the position title, organizational location and position designation (SES,SL, R&D-3104, AD). If SES, explain the status designation - career reserved or general.
- (2) Duties and Responsibilities. Clearly states the scope and complexity of functions and authorities delegated to the position in order of importance or priority.
- (3) Technical Qualifications. Identifies the factors required for successful performance. These factors should be identical to those listed in the approved Qualifications Standard. Managerial qualifications need not be included in the position description as OPM has prescribed five core executive qualifications for all SES positions.
- (4) Supervision. Identifies the levels of supervision exercised and received.

### **6.3 CLASSIFICATION EVALUATION STATEMENT**

- A. Each senior executive position description requires a signed classification evaluation statement which includes an analysis of the position duties and responsibilities with a comparison against the appropriate published OPM Classification Standard. In the absence of directly applicable standard, OPM issued guidance and guidelines may be used.

- B. Comparison of the proposed senior executive position with existing or previously existing senior executive positions may be used as supporting documentation but not as the sole basis for classifying or designating the position.

#### **6.4 STRENGTHENING OF DUTIES STATEMENT**

- A. A statement is required when the position was previously classified at the GS-15 grade level and is now being proposed for senior executive status.
- B. This statement should identify those additional duties and responsibilities which, when compared to the GS-15 grade level duties and responsibilities, now support a senior executive designation.

#### **6.5 STAFFING CHART**

A staffing chart must be attached to the classification evaluation statement and include a list of all subordinate GS-13 and above positions by:

- (1) organizational element;
- (2) title;
- (3) series and grade.

#### **6.6 IMPACT STATEMENT**

- A. The operating unit Appointing Authority must prepare an impact statement on all requests for the establishment of senior executive positions which identifies potential upgrading, downgrading, consolidation of functions, separation of functions, etc.
- B. If upgrading occurs, a list of those positions shall be included along with a projection of the increased cost in salaries.
- C. Proposed changes to Departmental Organization Orders which impact senior executive positions must be accompanied by an impact statement section specifically addressing the crosswalk (i.e., a listing showing current and proposed positions) of all existing positions, as well as any new positions.

## **CHAPTER 7. EXECUTIVE EMPLOYEE RELATIONS AND PERFORMANCE RELATED ACTIONS**

### **7.1 PROBATIONARY PERIOD - CAREER SES ONLY**

- A. An individual who receives an initial career appointment into the SES is required to serve a one year probationary period starting on the effective date of the appointment.
- B. The career appointee must receive a mid-point review to discuss performance. The operating unit human resources manager will notify the Appointing Authority of the mid-point performance review.
- C. The following conditions apply to crediting service towards completion of the probationary period.
  - (1) Time on leave with pay while in an SES position is credited. Earned leave for which the employee is compensated by lump-sum payment upon separation is not credited.
  - (2) Time in a nonpay status while in an SES position is credited up to a total of 30 calendar days (or 22 work days). After 30 calendar days, the probationary period is extended by adding to it time equal to that served in a nonpay status.
  - (3) Time absent on military duty or due to compensable injury is credited upon restoration to the SES when no other break in SES service has occurred.
  - (4) Time following transfer to an SES position in another agency is credited, i.e., the individual does not have to start a new probationary period.
- D. A career appointee who resigns or is removed from the SES before completion of the probationary period may not receive another SES career appointment unless selected under SES merit staffing procedures. The individual, however, need not be recertified by a QRB within 3 years of the previous QRB certification, unless the individual was removed for performance or disciplinary reasons.
- E. An individual who separated from the SES during the probationary period and who has been out of the SES more than 30 calendar days must serve a new 1-year



probationary period upon reappointment and may not credit previous time in a probationary period. In the following situations, however, there is an exception and the individual is only required to complete the remainder of the previously served probationary period.

- (1) The individual left the SES without a break in service for a Presidential appointment and is exercising reinstatement.
- (2) The individual left the SES without a break in service for other civilian employment that provides a statutory or regulatory reemployment right to the SES when no other break in service occurred.
- (3) The break in SES service was the result of military duty or compensable injury, and the time credited under paragraph (C)(3) of this section was not sufficient to complete the probationary period.

## **7.2 REMOVAL DURING PROBATIONARY PERIOD**

- A. A career appointee who is serving a probationary period may be removed from the SES for unacceptable performance or conduct. Failure to accept a directed reassignment or to accompany a position in a transfer of function are also reasons for removal.
- B. As a minimum, career appointees who held a career or career-conditional appointment, or an appointment of equivalent tenure as determined by OPM at the time of appointment into the SES shall:
  - (1) Receive written notification from the Appointing Authority before the effective date of the removal action. (See 5 U.S.C. 7511 and 7543 for specific coverage requirements and provisions.)

The notification action shall:

- (a) state the agency's conclusions as to the inadequacies of the performance or the basis for the removal action, including the act of misconduct, neglect of duty, or malfeasance, if these actions are involved;
- (b) indicate whether the employee has placement rights and, if so, the position to which the appointee will be assigned; and

- (c) provide the effective date of the action.
- (2) Be entitled to placement in a Civil Service position (other than SES) which is at GS-15 or above in the General Schedule or a position of equal tenure to that held immediately before SES appointment if removal was for a reason other than misconduct, neglect of duty, malfeasance or other disciplinary reasons. The career appointee must be qualified for the position.
- (3) Placement under this section shall not cause the separation or reduction in grade of any other employee.
- (4) A career appointee placed under this section shall be entitled to receive basic pay at the highest of:
  - (a) the rate of basic pay in effect for the position in which placed;
  - (b) the rate of basic pay in effect at the time of the placement for the position the career appointee held in the Civil Service immediately before being appointed to the Senior Executive Service; or
  - (c) the rate of basic pay in effect for the career appointee immediately before being removed from the Senior Executive Service position.
- C. If the career appointee did not hold a career or career-conditional appointment, or appointment of equivalent tenure as determined by OPM, the career appointee shall receive written notification from the Appointing Authority at least one day before the effective date of the removal action. The notification action shall:
  - (1) state the agency's conclusions as to the inadequacies of the performance or the basis for the removal action, including the act of misconduct, neglect of duty, or malfeasance, if these actions are involved; and
  - (2) provide the effective date of the removal action.
- D. The removal of a probationer for performance reasons, or disciplinary action, may not be made effective within 120 days after:
  - (a) The appointment of a new Department head; or

- (b) The appointment of an appointee's most immediate supervisor who is a noncareer appointee and has the authority to remove the appointee.
- (c) An exception to (a) and (b) above is authorized when a career appointee has received a final rating of unsatisfactory under the OPM-approved performance appraisal system before the appointment of the new agency head or noncareer appointee.

### **7.3 PERFORMANCE RELATED ACTIONS AFTER COMPLETION OF PROBATIONARY PERIOD**

- A. A career appointee who has been given an Unsatisfactory rating must be removed from his/her position. The appointee shall be reassigned to another SES position or removed from the SES.
  - (1) If the SES appointee is to be reassigned, the Appointing Authority shall provide a 15-day written notice in advance of the effective date, if within the commuting area; and a 60-day written notice in advance of the effective, if outside of the commuting area, to the appointee. The notice shall give the reason for the action, the position in which the appointee will be placed, and the effective date. In addition, the 120-day moratorium applies unless the unsatisfactory rating was issued before the appointment of the person taking the reassignment action.
  - (2) If the appointee is to be removed, the requirement of Section 7.3B, excluding (2) shall apply. If the appointee is to be removed from the SES and, at the time of appointment to the SES did not hold a career or career-conditional appointment or an appointment of equivalent tenure so as to have guaranteed placement rights, the requirements of Section 7.3B, excluding (2) shall apply.
- B. A career appointee who has been given two final ratings of Unsatisfactory under the SES performance appraisal system within five consecutive years, or who has been given two final annual ratings of less than Fully Successful under the SES performance appraisal system within three consecutive years, must be removed from the SES. The Appointing Authority shall notify the appointee in writing at least 30 calendar days in advance of the effective date. The notification shall state:
  - (1) the basis for the action;
  - (2) the position to which the appointee will be assigned (can be issued as a

supplementary notice not later than 10 calendar days before the effective date of the action);

- (3) the appointee's right to request an informal hearing from the Merit System Protection Board (See Section 7.6.);
- (4) the effective date of removal from the SES; and
- (5) when applicable, the appointee's retirement options.

#### **7.4 RESTRICTION ON PERFORMANCE RELATED ACTIONS**

- A. Involuntary removal of a career senior executive may not be made effective within 120 days after:
  - (1) the appointment of a new Department head; or
  - (2) the appointment of the senior executive's most immediate supervisor who:
    - (a) is a noncareer appointee, and
    - (b) has the authority to remove the senior executive.
- B. This limitation does not apply when the senior executive has received a final rating of unsatisfactory before the appointment of a new Department head or the appointment of the senior executive's most immediate noncareer supervisor who has the authority to remove the senior executive.

#### **7.5 INFORMAL HEARING**

A career senior executive being removed from the Senior Executive Service is entitled to request an informal hearing at least 15 days before the removal, before an official designated by the Merit Systems Protection Board (MSPB). The informal hearing procedure requires that:

- o the senior executive submit a request for an informal hearing to the MSPB no later than 15 days before the effective date of the action; and
- o the informal hearing be conducted in accordance with regulations and procedures established by the MSPB.

The removal action need not be delayed as the result of the granting of such informal hearing.

## **7.6 APPEAL RIGHTS**

Removal actions under Section 7.2 and 7.3 are not appealable. Failure to meet the senior executive's entitlement to placement and pay would constitute a prohibited personnel practice and allegations of such violations may be submitted to the Special Counsel of the MSPB.

## **7.7 REINSTATEMENT RESTRICTION**

An individual whose last appointment in the SES ended in a removal based on unacceptable performance, misconduct, neglect of duty, malfeasance or for national security reasons or by action of the Merit Systems Protection Board upon the recommendation of the Special Counsel, or for any reason during the probationary period, or whose appointment in the SES ended in a resignation after receipt of a notice proposing or directing removal under any of the preceding conditions, shall not be eligible for non-competitive reinstatement to a career appointment in the SES.

## **7.8 OTHER RIGHTS AND BENEFITS**

This Section applies to all members of the SES regardless of type of appointment.

- (1) Grievances. SES appointees are covered by administrative grievance procedures of the Department.
- (2) Annual Leave. There is a 90 day (720 hours) limitation on the amount of annual leave which may be accumulated by an SES appointee. SES employees who had annual leave in excess of 720 hours prior to the start of the first pay period beginning after October 13, 1994, are allowed to retain that leave as a personal leave ceiling. Annual leave, in excess of 240 hours that was earned prior to an SES appointment, however, is subject to forfeit if not used by the end of the leave year preceding appointment to SES.
- (3) Retirement. Retirement rules and regulations for SES are consistent with those for all government employees, except that by law SES appointees who are removed from the SES for reasons of performance are eligible for an immediate annuity, if otherwise qualified (i.e., have completed 25 years of service, or have completed 20 years of service and reached the age of

50).

## **7.9 OTHER EXECUTIVE APPOINTEES**

Other executive appointees (Senior-Level, ST-3104, Administratively Determined) shall be governed by rules and regulations which cover the general workforce.

## **CHAPTER 8. ADVERSE ACTION**

### **8.1 SENIOR EXECUTIVE SERVICE**

- A. This Chapter covers SES career appointees who have completed the probationary period or who had coverage (rights to adverse action procedures) immediately prior to entering the SES. Adverse actions include removal from the Civil Service for misconduct, neglect of duty, or malfeasance, and suspension from work and pay for more than fourteen days. For purposes of this Chapter, adverse actions do not include performance-based actions, actions by the Merit Systems Protection Board upon recommendation of the Special Counsel, reductions in force, and action taken for reasons of national security under 5 U.S.C. 7532. Adverse actions may only be taken for reason of misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.
- B. The following procedures will be followed when taking an adverse action against an SES appointee and after coordination with the Office of the General Counsel:
  - (1) If the adverse action is proposed:
    - (a) By an individual who is subordinate to the Appointing Authority, then the Appointing Authority shall receive and consider the reply of the appointee. At the earliest practicable date, but before the action will be effective, the Appointing Authority shall make a final decision on the proposed action, give a written decision with specific reasons, and if upholding the proposed action, the employee's appeal rights.
    - (b) By the Appointing Authority, then either of the following options are available:
      - o the Appointing Authority may propose the adverse action as well as receive and consider the reply of the appointee and, at the earliest practicable date but before the action will be effective, make the final decision on the proposed action, give a written decision with specific reasons, and if upholding the proposed action, the employee's appeal rights; or
      - o if having a different proposing official from deciding

official is desired, the servicing Human Resources Manager may propose the adverse action and the Appointing Authority may receive and consider the reply of the appointee and, at the earliest practicable date but before the action will be effective, make the final decision on the proposed action, give a written decision with specific reasons, and if upholding the proposed action, the employee's appeal rights. decide.

Both options should be carefully considered, and the rationale for the choice evident.

- (2) The appointee must be given at least a 30 day advance written notice unless there is reasonable cause to believe that the appointee has committed a crime for which a sentence of imprisonment can be imposed. The notice must state specific reasons for the proposed action.
- (3) The appointee is entitled to be represented by an attorney or other representative, at the appointee's expense.
- (4) The appointee shall be notified of his/her right to review all the material used to support the proposed action. Materials which cannot be disclosed to the appointee, or to his/her representative or attorney or physician in the case of medical records, may not be used to support the adverse action.
- (5) The appointee shall be given a reasonable amount of official time to review the material relied on to support the proposed action, to prepare an answer orally and in writing and to secure affidavits and other documentary evidence, if the appointee is in an active duty status.
- (6) If the appointee wishes the agency to consider any medical conditions that may have affected the basis for the adverse action, the appointee shall be given reasonable time to furnish medical documentation of the condition.
- (7) A hearing shall not be provided.
- (8) An appointee against whom an adverse action is taken is entitled to appeal to the MSPB.



- (9) Operating units shall maintain and furnish to the MSPB and to the affected appointee upon his/her request, the following:
  - (a) A copy of the notice of proposed action;
  - (b) Documentation relied on to support the proposed action;
  - (c) The answer of the appointee when written, and a summary thereof when made orally;
  - (d) The notice of the decision including reasons for the adverse action; and
  - (e) Any order affecting an action under this Chapter.
- C. Removal or suspension for disciplinary reasons is not subject to the 120 day moratorium; appointees so removed are not entitled to placement outside the SES.
- D. Noncareer and limited appointees (except as described in E below) may be removed at any time. They must be given a written notice at least 1 day prior to the effective date of the removal; a statement of the reason for the action may be provided, but is not required.
- E. A limited term or limited emergency appointee who received the limited appointment without a break in service in the same agency as the one in which the employee held a career or career-conditional appointment (or appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the SES; and who was covered under 5 U.S.C. 7511 immediately before appointment to the SES, is covered under the procedures described in B above.
- F. Reemployed annuitants serve at the pleasure of the Appointing Authority.

## **8.2 OTHER EXECUTIVE APPOINTEES**

Adverse actions on other executive appointees (Senior- Level, ST-3104, Administratively Determined) shall be governed by rules and regulations which cover the General workforce.

## **CHAPTER 9. REDUCTION IN FORCE**

(RESERVED)

**Reduction in force provisions are under revision by the Office of Personnel Management. Therefore, this section will be provided at a later date. However, it is the Department's policy that the abolishment of an executive level position requires the approval of the Director, Office of Human Resources Management, and that every effort will be made to place any affected employee.**

## **CHAPTER 10. SES FURLOUGH REGULATIONS**

**Furlough provisions are under revision by the Office of Personnel Management. Therefore, this section will be provided at a later date.**

## **CHAPTER 11. EXECUTIVE DEVELOPMENT**

### **11.1 CANDIDATE DEVELOPMENT**

- A. As necessary, the DERB will determine whether SES vacancy forecasts necessitate announcing an SES Candidate Development Program.
- B. If announced, individuals will be competitively selected and placed into full time positions at either the Department or operating unit level. Additional guidance is found in Appendix, Section 8.
- C. Intensive developmental activities will focus on the following areas:
  - (1) Strategic vision;
  - (2) Human resources management;
  - (3) Program development and evaluation;
  - (4) Resources planning and management; and
  - (5) Organizational representation and liaison.
- D. The Director, Office of Human Resources Management will monitor this program for the DERB.
- E. It is anticipated that program graduates will be offered SES positions, generally by the organization which endorsed their candidacy. If no SES positions are available at the end of the program, candidates will be given reemployment rights at the same grade level in the operating unit which endorsed their candidacy and will be given consideration for any SES position for which they qualify.

### **11.2 SABBATICALS**

A career appointee may apply through the Operating Unit Executive Resources Board (OERB) to the Department for a sabbatical to engage in study or uncompensated work experience for up to eleven months which will contribute to the appointee's development and effectiveness. The Director, Office of Human Resources Management will review proposals for sabbaticals and make a recommendation to the CFO/ASA.

- A. Departmental Requirements

Requests for sabbaticals will be submitted by the Head of the operating unit to the Director for Human Resources Management. These will be reviewed for legal and regulatory compliance prior to referral to the CFO/ASA for decision and must address how the position will be filled, the position the executive will return to, and the benefits to the service. Candidates must have a current performance rating of at least Commendable. Applications will be coordinated by the cognizant OERB, ranked in priority order, and cost estimates developed prior to submission.

B. Legal Requirements

- (1) To be eligible for a sabbatical, the appointee must have completed seven years of service:
  - (a) in one or more positions in the SES;
  - (b) in one or more other positions in the civil service equivalent to positions in the SES; or
  - (c) in any combination of such positions, except that not less than two years of such seven years of service must be in the SES.
- (2) The appointee agrees, as a condition of accepting the sabbatical, to serve in the civil service upon completion of the sabbatical for a period of two consecutive years.
- (3) The Secretary may grant a sabbatical for up to 11 months.
- (4) A sabbatical shall not result in loss of, or reduction of, pay, leave, credit for time of service, or performance rating.
- (5) Travel expenses (including per diem) may be authorized.
- (6) SES career members who are eligible for voluntary retirement with an immediate annuity cannot be granted a sabbatical.
- (7) Sabbaticals may only be granted to an individual once in any 10 year period.
- (8) The selectee must sign a written continue-in-service agreement as a condition for being granted a sabbatical.

The agreement shall read:

I, \_\_\_\_\_, agree as a condition of accepting the sabbatical, to serve in the civil service upon completion of the sabbatical for a period of two consecutive years. I further agree that if I fail to carry out this agreement (except for good and sufficient reasons as determined by the Secretary or Designee), I am liable to the United States for payment of all expenses (including salary) of the sabbatical. The amount shall be treated as a debt due to the United States.

### **11.3 INCUMBENT DEVELOPMENT**

Each SES appointee is encouraged to continue with his/her executive development through training courses, formal training programs and mobility assignments. The OERB shall approve an individual development plan for each appointee.

## **CHAPTER 12. SENIOR EXECUTIVE SERVICE PERFORMANCE APPRAISAL SYSTEM**

### **12.1 COVERAGE**

The Senior Executive Performance Appraisal System applies to all senior executives of the Department who occupy Senior Executive Service (SES) positions, including career, noncareer, and SES limited appointees (Additional information may also be found in DAO 202-430, Appendix A.). Other non-SES executive appointees shall be governed by the General Work Force Performance Appraisal System.

### **12.2 TIMETABLE OF PERFORMANCE MANAGEMENT ACTIVITIES**

- A. The Department's performance appraisal period begins on October 1 and ends the following September 30. In unusual circumstances, the performance appraisal period may be ended early provided the 120-day minimum period is met and provided an adequate basis to rate the executive's performance exists.
- B. The minimum performance appraisal period is 120 days.
- C. Performance elements and standards based on the requirements of the senior executives' positions must be communicated to all senior executives at or before the beginning of the appraisal period. A written plan must be developed, approved, and provided to each senior executive, normally within 30 days of the beginning of the appraisal period.
- D. When a senior executive enters a covered position or changes positions after the start of the appraisal period, a performance plan must be established and approved within 30 days of the effective date of the appointment to the new position.
- E. When a senior executive is detailed or temporarily assigned to a covered position within the Department and is expected to serve in the position for 120 days or more, he or she must have an approved performance plan within 30 days of the beginning of the detail.
- F. Interim summary performance ratings are required when a senior executive changes positions after serving in a covered position for at least 120 days, or when a senior executive completes a detail within the Department of at least 120 days during the appraisal period, and must be completed within 30 days of the change of position or end of the detail.

- G. Appraisals and annual ratings of record must be completed within 45 days of the end of the appraisal period, except that senior executives who are unratable at the end of the appraisal period because they have not served in a covered position for at least 120 days of the appraisal period, must be rated after completing 120 days in a covered position.
- H. Appointing Authorities must complete the Department's annual performance plan completion report and forward it to the Department by November 30 each year.
- I. Performance ratings of record for senior executives are effective on the last day of the appraisal cycle (September 30) each year. For those senior executives who enter into a covered position within the last 120 days of the appraisal period (see G above), the rating of record is effective the first day of the first pay period after the senior executive completes 120 days in the new position.
- J. Notwithstanding any other requirements of this document, a career senior executive may not be appraised and rated within 120 days after the beginning of a new Presidential Administration.

### **12.3 PERFORMANCE APPRAISAL PROCESS**

The appraisal process involves three distinct stages: performance planning, progress review, and appraisal. Each covered senior executive must receive a performance rating annually. The appraisal process is used to communicate organizational goals, reinforce senior executive accountability for those goals, and track and evaluate individual and organizational results.

#### **A. Performance Planning**

- (1) Approximately four weeks before the start of the appraisal period, rating officials (supervisors) and senior executives should begin developing written performance plans for the next appraisal period. The process must include consultation with the senior executive about the contents of the plan. Performance plans must be recorded on form CD-516, "Classification and Performance Management Record." Performance plans must be completed and signed by the rating official and the senior executive at the beginning of the appraisal period.

Performance plans must include:

- (a) Critical elements which reflect the senior executive's major duties



and responsibilities and which are consistent with current job assignments and with the level of duties described in the senior executive's position description. If the element relates to a Secretarial level objective, it must be designated on Form CD-516 as critical and as being tracked at the Department level. The number of critical job elements should be kept to a manageable level, normally not more than five or six.

- (b) Organizational objectives must be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results. Elements may be drawn from a number of sources including: mission and functional statements, position descriptions, management-by-objectives (MBO's) and other planning documents, operating budget justifications, and affirmative action plans.
- (c) Other factors that must be accounted for in performance plans for senior executives include: improvement in efficiency, productivity, quality of work or service; any significant reduction in paperwork; cost efficiency; timeliness of performance; other indicators of effectiveness, productivity, and performance quality of the employees supervised; or meeting affirmative action goals and achievement of equal employment opportunity requirements.
- (d) An objective, specifying the overall result each element is expected to accomplish, along with the major activities the senior executive must undertake to accomplish each element, must be communicated in writing in the senior executive's performance plan.
- (e) For any job designated as supervisory, duties such as recommending or making personnel decisions, developing and appraising subordinates, fulfilling equal opportunity and affirmative action responsibilities, and other supervisory duties must be addressed as a critical element (or as major activities of a critical element). Additionally, supervisors and managers who fail to meet performance appraisal deadlines (including development of performance plans) as specified in this document should have their own appraisals so documented. Developing generic elements is strongly encouraged.

- (2) Weights must be assigned to each element on the basis of the amount of time required to accomplish the element and/or its importance. The total of the weights must be 100%. Assigning weights to the major activities listed under an element is not permitted. Non-critical elements may be included in performance plans, but must be assigned very low weights and represent a small percentage of the total plan. In no case may a non-critical element be assigned a higher weight than any critical element included in the performance plan.
- (3) Performance standards must be used to evaluate levels of accomplishment for critical (and any non-critical) elements. Standards should define performance in terms of results (what is to be accomplished) and process (how it is to be accomplished). (Note: The results may already be expressed under the major activities listing. In such a case they do not need to be repeated as standards since they are already specified for the senior executive.) The generic performance standards (GPS) attached to the performance plan are defined at each of the five required rating levels and must be used to evaluate the performance of all senior executives covered by this system. Specific quantitative, timeliness, cost-effectiveness, and qualitative standards, if they apply to a particular critical element and if they will be used to evaluate a senior executive's performance, must be included as supplemental standards. (If these standards are specified in operational manuals or other documents made available to the senior executive, those documents may simply be referenced in the performance plan.) Such standards need be written only at the Fully Successful level, since the GPS are written at all five performance levels and refer generically to different levels of quality, timeliness, quantity, and cost-effectiveness.
- (4) If a rating official and a covered senior executive disagree on the contents of the performance plan, the rating official and senior executive should attempt to resolve the disagreement on an informal basis. However, the rating official must make the final decision regarding the contents of the plan.
- (5) When developing performance plans, the following factors should be considered:
  - (a) Criticality/Relevance. Have appropriate critical elements been identified? Are the elements derived from the overall mission of the work unit?

- (b) Comprehensiveness. Does the plan cover all of the senior executive's major duties and responsibilities?
  - (c) Clarity. Are critical elements and performance standards clearly and fully described?
  - (d) Quantification. Can achievements be measured with the standards identified?
- (6) When a senior executive enters a covered position or moves from one covered position to another after the start of the appraisal period, and when a senior executive serves on a detail of 120 days or more, a performance plan must be established and approved for the senior executive, following the guidelines in A (5) of this section.

B. Progress Reviews

- (1) At a minimum, rating officials must conduct a formal progress review with their senior executives at approximately the midpoint of the appraisal period. Senior executives may also request (or rating officials may schedule) additional progress reviews. The progress review must include discussion of:
  - (a) The senior executive's progress toward meeting the objectives of the elements included in his or her performance plan;
  - (b) The need for changes in the plan based on changes in responsibilities; and
  - (c) The identification of any performance deficiencies and recommendations on how to improve them by the rating official.
- (2) There must be a record of the progress review. Both the supervisor and senior executive should date and initial the performance plan to indicate the review took place.
- (3) Progress reviews should also be scheduled and conducted for senior executives who enter covered positions after the start of the appraisal period. These progress reviews should be completed near the midpoint of the shortened appraisal period.

- (4) A progress review must also be initiated by the rating official if a senior executive's performance on one or more critical elements falls below the Fully Successful level. In such a case the rating official must discuss the instances of less than Fully Successful performance and should outline in writing what is required by the senior executive to bring his or her performance up to the Fully Successful level.

C. Appraisal

- (1) Senior executives must be appraised annually. Every senior executive who occupies a covered position on the last day of the appraisal cycle and who has been in a covered position for at least 120 days during the appraisal cycle must receive an annual performance appraisal rating of record, in accordance with the following:

- (a) Rating officials must prepare and discuss with each senior executive they supervise an initial written rating of performance. This rating must be based on an assessment of the merit of the senior executive's performance against the standards set at the beginning of the period (or as modified and documented during a progress review) in the performance plan and must include a written rating for each individual performance element based on the following:

Outstanding (5)	Meets or exceeds standards written at this level.
Commendable (4)	Meets standards written at this level.
Fully Successful (3)	Meets standards written at this level.
Minimally Satisfactory (2)	Meets standards written at this level.
Unsatisfactory (1)	Fails to meet standards written at the minimally satisfactory level.

- (b) Each critical (and non-critical) element must be rated using the above five-level element rating scale. Ratings of elements above and below Fully Successful must be supported by a narrative justification. If an element is rated as Fully Successful, the rating official need only document in writing that: (1) the Fully

Successful standards were met, and (2) that the rating was discussed with the senior executive, unless the senior executive requests written justification of the Fully Successful rating. In such a case, the rating official must provide written justification of the rating.

- (c) To obtain the overall summary rating, each element must be rated using the five-level element rating scale (Outstanding = 5, Commendable = 4, Fully Successful = 3, Minimally Satisfactory = 2, and Unsatisfactory = 1). (No fractional scores or weights may be used.) Then, each individual element rating is multiplied by the weight assigned to that element (e.g., critical element #1 is weighted at 30% and receives a rating of Commendable or 4;  $4 \times 30\% = 120$  points). The points assigned the individual elements are then totaled to determine an overall summary rating based on the following scale:

Outstanding	460 - 500
Commendable	380 - 459
Fully Successful	290 - 379
*Minimally Satisfactory	200 - 289
*Unsatisfactory	A summary rating of Unsatisfactory must be assigned to any senior executive who is given an Unsatisfactory rating on one or more critical elements.

\*A covered senior executive who fails to meet at least the Fully Successful level standards in one (or more) critical element(s) must not be given a Fully Successful or above rating, no matter what point total the senior executive earns.

- (d) If a senior executive has received an interim summary performance rating for service in another covered position within the Department during the appraisal period (as provided for in Section 12.2 F. of this chapter), then that summary rating (or ratings) must be considered as follows in determining the senior executive's final rating of record:

The rating official completes his or her appraisal of the senior executive on his/her current position (if in that position for 120 days or more of the appraisal period) and assigns a total score. That score is doubled and added to the interim rating score(s) given by any other supervisor(s). This new total is then divided by the number of positions occupied for 120 days or more plus 1, i.e., either 3 or 4, and a final total score is assigned. (Scores with decimals should be rounded to the next highest number.) For example:

Example 1:

Interim rating score:	$360 \times 1 = 360$
Current rating official's score:	$480 \times 2 = 960$

$$\begin{array}{r} 1320 \\ 1,320 / 3 = 440 \end{array}$$

The senior executive's recommended rating would be 440 or Commendable.

Example 2:

Interim rating score:	$390 \times 1 = 390$
Interim rating score:	$375 \times 1 = 375$
Current rating official's score:	

$$\begin{array}{r} 450 \times 2 = 900 \\ 1,665 \\ 1,665 / 4 = 417 \end{array}$$

The senior executive's recommended rating would be 417 or Commendable.

In computing an overall performance rating using this formula, the rating assigned by the current supervisor (the one that is to be doubled) must be checked carefully to make sure that a non-critical element is not given more weight (because of the doubling) than any critical element in the other interim ratings. (OPM regulations prohibit giving more weight to non-critical elements than to critical elements in deriving final ratings.) If, because of the doubling, the non-critical element score exceeds that of any of the critical element scores, the point score of the non-critical element must be reduced to its original total (before the doubling) and the summary point total adjusted

appropriately.

- (e) If a senior executive has served in a covered position for more than the minimum appraisal period in another Federal agency, that agency is required to provide an interim summary rating of performance and forward it to the Department's employing office with the senior executive's Official Personnel Folder. The rating official must consider the interim rating when determining the senior executive's initial rating at the end of the appraisal cycle. If a senior executive has served on a detail to another Federal agency for more than 120 days during the appraisal cycle, a sabbatical, or an assignment in a Federally-sponsored program such as an IPA or Executive Exchange, the human resources management office must make a reasonable effort to obtain an interim summary rating from the other agency on the senior executive's performance on the detail, assignment, or sabbatical. If the interim rating is obtained, it must be considered in deriving the senior executive's initial rating at the end of the appraisal cycle. If the senior executive has served for the entire rating cycle on detail to another agency and an appraisal of performance cannot be obtained despite reasonable efforts, the senior executive's current rating of record must be extended. If the senior executive has no current rating of record, then he or she must be given a presumptive rating of Fully Successful.
- (f) The senior executive must sign the initial rating to indicate that it has been discussed. A copy must be given to the senior executive. The senior executive may comment on the rating in writing to the rating official within five working days of receipt of the appraisal and rating. If the rating official changes a rating at this point, he/she must document the reasons for the change on Form CD-96A and provide a copy to the senior executive.
- (g) A senior executive may request a review of his/her rating by an official in a position higher than the rating official, unless there is no one at a higher level within the Department. If the senior executive requests a higher level review, his or her written response to the initial rating must be provided to the reviewer. The reviewer may comment on and must make a recommendation regarding the initial rating, but may not change it. A copy of the reviewer's comments and recommendations must be provided to the senior executive, the rating official, and the Performance Review Board (PRB).
- (h) The appropriate PRB must review each senior executive's initial rating, and if any, the senior executive's written response and the higher level reviewer's comments and recommendations. The PRB is also authorized to conduct any

further review or investigation that it finds necessary. The PRB must then recommend in writing a final rating to the Appointing Authority.

- (i) The Appointing Authority must consider the recommendations of the PRB and issue final ratings in writing. A copy of the final rating must be provided to each senior executive.
  - (j) Appointing Authorities must ensure that senior executives are not given awards under 5 CFR 451.101 (superior accomplishment award) for accomplishments properly recognized through the granting of an SES performance award (bonus).
- (2) Senior executives who are serving in covered positions on the last day of the appraisal period, but who are unratable because they have not served for at least 120 days during the appraisal period in a covered position must be given an annual rating of record in accordance with the provisions of paragraph C (1) above (including PRB review) as soon as they have served for the minimum period. A senior executive may be unratable because of entry into a covered position within the last 119 days of the appraisal period; time in a non-pay status; long-term training; service on a Federally-sponsored program such as an Intergovernmental Personnel Act or President's Executive Exchange assignment for which appraisal information is not available; service on detail to another Federal agency for which appraisal information is not available; or the departure of the senior executive's supervisor from the agency, when no other higher level supervisor can reasonably appraise the senior executive's performance.
  - (3) The current ratings of record of senior executives who are unratable on the last day of the appraisal period are extended if they are not then working in a covered position that can serve as a basis for an appraisal (for example, they are continuing on long-term training) and they are not expected to return to such a position within 120 days. If these senior executives have no ratings of record, they receive a presumptive rating of Fully Successful.

D. Interim Summary Ratings

- (1) When a senior executive who has served in a covered position for 120 days or more and the appraisal period changes to another covered position within the Department, an interim rating must be completed by the executive's supervisor, and signed by the Appointing Authority. Interim ratings must also be completed when a senior executive completes a detail within the Department of 120 days or more in a covered position. In such cases, the



rating must be based on the elements and standards established for the position the senior executive is leaving. Copies of the interim rating must be given to the senior executive, the gaining supervisor, and the servicing human resources management office of the gaining organization. Interim ratings are not reviewed by the PRB, but copies should be furnished to the PRB when it reviews annual ratings of record. Rating officials must consider interim ratings in determining final ratings of record.

- (2) When a senior executive transfers from the Department to another Federal agency after serving in a covered position in the Department for more than 120 days, the senior executive's supervisor and the Appointing Authority must complete an interim rating. The interim rating must be transferred to the gaining agency for consideration in the senior executive's next rating of record.
- (3) Interim ratings are not ratings of record for reduction in force or other purposes.

E. The following summary performance ratings constitute ratings of record:

- (1) The annual performance appraisal rating provided for in 12.3C(1); and
- (2) Ratings given after the minimum appraisal period an executive is unratable at the end of the appraisal cycle, as provided for in 12.3C(2).

No other summary rating given to a senior executive of the Department constitutes a rating of record.

- F. When a senior executive is rated below the Fully Successful level, the operating unit must attempt to help the senior executive improve his or her performance. Assistance may include, but is not limited to, formal training, on-the-job training, counseling, and closer supervision.
- G. The Department does not prescribe a distribution of ratings, and does not permit a distribution to be prescribed. The Department assures that only senior executives whose performance exceeds normal expectations are rated at levels above Fully Successful by the higher level review process, by PRB review, by review of plans by the human resources management office, and by Departmental oversight reviews.

## **12.4 PERFORMANCE REVIEW BOARDS**

A. Operating Unit PRB's

- (1) Each operating unit may establish one or more internal PRB's or combine with other operating units to establish one for mutual use.
- (2) Each PRB must have at least three members and must develop a written charter (subject to approval by the Director for Human Resources Management) which:
  - (a) Lists required and discretionary functions;
  - (b) Lists criteria to be used by PRB members to review individual performance appraisals;
  - (c) Lists the operating procedures used by the PRB; and
  - (d) Identifies the PRB's membership composition, selection process, and terms of office.
- (3) Appointing Authorities must appoint members to the PRB designating one member, who must be a Commerce employee as chairperson. Sufficient career senior executives must be appointed so that more than one-half of the members are career appointees. The Appointing Authority must ensure that at least one member appointed is not under his or her jurisdiction. Each member appointed must have a current performance rating of at least Fully Successful.
- (4) A PRB member must not participate in a performance appraisal review when:
  - (a) The review pertains to that PRB member;
  - (b) The PRB member is the rater of the senior executive whose performance appraisal is being reviewed;
  - (c) The PRB member is the direct subordinate of the senior executive whose performance appraisal is being reviewed; or
  - (d) The PRB member was the designated higher level reviewer of the senior executive whose performance is being reviewed.
- (5) The names of individuals appointed to the PRB must be published in the Federal Register within 45 days after the appointment is approved. No

member may serve until this is done. (For additional information, see Appendix, Sections 12 and 13.)

B. Departmental Performance Review Board (DPRB)

- (1) A DPRB must be established to provide a "higher level" review of the appraisal, ratings and recommendations of executives evaluated by the Appointing Authority. Review by the DPRB is by request of the executive.
- (2) The Secretary of Commerce or his or her designee serves as the Chairperson of the DPRB and selects the other members of the Board. Members of this Board may be appointed from within or outside the Department. Provisions contained in A (2)-(4) of this section apply to this Board with the exception that the Board is not required to have at least one member who is not under the jurisdiction of the Appointing Authority. (For additional information, see Appendix, Sections 12 and 13.)

**12.5 FAILURE TO MEET PERFORMANCE REQUIREMENTS**

- A. A senior executive who receives a Level 1 rating of record, Unsatisfactory, must be reassigned or transferred within the SES, or removed from the SES.
- B. A senior executive who receives two Level 1 ratings of record, Unsatisfactory, in any period of five consecutive years must be removed from the SES.
- C. A senior executive who twice in any period of three consecutive years receives less than a Level 3, Fully Successful, rating of record must be removed from the Senior Executive Service.

- D. Any action taken under this section is subject to the provisions of 5 U.S.C. 3591-95 and 5 CFR Part 359.

## **12.6 TRAINING AND INFORMATION**

- A. Servicing human resources management offices are responsible for communicating the purpose and procedures of the Senior Executive Service Performance Appraisal System by establishing appropriate training and orientation programs. These programs must emphasize performance plan development, supervisory/management responsibility for carrying out the program, and the linkage between performance ratings and senior executive recognition and other personnel decisions.
- B. Information on changes in the operation of the Senior Executive Service Performance Appraisal System are conveyed to Department management and affected senior executives through Office of Human Resources Management issuances and newsletters.

## **12.7 EVALUATION**

The Office of Human Resources Management assesses the effectiveness of the Senior Executive Service Performance Appraisal System through its ongoing Oversight Program. Commerce organizations are reviewed to determine their technical compliance with law, Office of Personnel Management regulations, and Department policy. Reviews focus on the adequacy of performance plans and ratings as well as each organization's performance rating distribution as related to its organizational accomplishments.

## **12.8 RECORD KEEPING**

- A. Employee Performance Folders (EPF's) must be established for each senior executive, be retained as separate files, and maintained by the operating unit. EPF's must contain at least the following information:
  - (1) the individual performance plans;
  - (2) documentation of progress review(s);
  - (3) summary appraisals and ratings;
  - (4) written comments on ratings, if any;

- (5) PRB/DPRB recommendations; and
- (6) nominations for bonuses and ranks.

Operating units, at their discretion, may require that additional information be kept in the EPF.

- B. All performance-related records contained in the EPF must be retained for five years.
- C. When a senior executive transfers to another operating unit within the Department, or to another Federal agency, EPF records must be transferred with the employee.
- D. Disclosure of information contained in EPF's may be made only as permitted by the Privacy Act.

## **CHAPTER 13. SPECIAL RECOGNITION PROGRAMS**

### **13.1 TYPES OF EXECUTIVE RECOGNITION**

The Department uses four types of recognition to reward its senior executives:

- A. Presidential Rank Awards are granted only to career SES appointees. Two categories of rank awards - Meritorious Executive (20 percent of base pay) and Distinguished Executive (35 percent of base pay) - are used to recognize prolonged high quality executive performance covering a period of at least three years. (See Appendix, Section 9, Presidential Rank Awards.)
- B. Performance Awards (SES Bonuses) are granted after the end of the SES performance appraisal period. Awards range from 5-20% of base pay as of the end of the performance appraisal period. The rate of basic pay does not include locality - based comparability payments or special law enforcement adjustments under the Federal Employees Pay Comparability Act of 1990, and recognize only career executives for their performance during the last appraisal period. (See Appendix, Section 10, Performance Awards).
- C. SES Pay Rate Adjustments, based on performance, may be granted to career or noncareer senior executives under circumstances outlined in Chapter 5, Section 5.3 of this Manual.
- D. It is the Department's policy that Special Act or Service awards not be granted to executive personnel. However, Suggestion and Invention awards may be granted to recognize contributions by employees or groups of employees which result in tangible benefits or savings or intangible benefits to the Government. (See Appendix, Section 11.)

### **13.2 PROCESS**

The Departmental process for granting recognition to senior executives requires a series of reviews and clearances prior to final approval. This assures that appropriate recognition is granted only to the most deserving senior executives. The awards process includes the following steps:

- A. The immediate supervisor of the executive recommends recognition based on the employee's performance or other accomplishment(s).
- B. The recommendation is transmitted through clearance channels to the operating unit PRB or the DPRB for review (Presidential Ranks, bonuses and performance related pay rate level adjustments only).
- C. It is then transmitted to the operating unit Appointing Authority for concurrence or rejection. Recommendations for Presidential Rank Awards, SES Performance

Awards (Bonuses) and performance related pay rate level adjustments are arranged in priority order by the Appointing Authority before being submitted to the Department.

- D. All recommendations for executive recognition are submitted to the Director, Office of Human Resources Management in his/her capacity as Executive Secretary for the Departmental Executive Resources Board (DERB). Each submission is reviewed for adherence to legal and regulatory requirements and for compliance with Departmental policy.
- E. The Executive Secretary either returns all recommendations to the submitting Appointing Authority (if they do not comply with established requirements and criteria) or forwards them to the DERB.
  - (1) The DERB then performs a final review and forwards its recommendations for recognition (in priority order) for Presidential Rank Awards and SES Bonuses to the Secretary.
  - (2) The Secretary forwards Presidential Rank award nominees for consideration by the Office of Personnel Management.

### **13.3 FUNDING**

Each awards program will be funded by the operating units. Payment of any award to any senior executive may not be made unless authorized by the Secretary.

### **13.4 AWARDS PAYMENT**

- A. Cash payments for Presidential Rank Awards, SES Bonuses, and incentive awards are not subject to retirement fund contributions or creditable for inclusion in the "high three" average pay computation for retirement benefits. These payments are subject to withholding for income tax.
- B. A career senior executive can receive both an SES Bonus and a Meritorious Presidential Rank Award, but the total of an employee's basic salary combined with these forms of recognition may not in any one calendar year exceed the

annual rate payable for Executive Level I in effect at the end of the same fiscal year. ( Note that Office of Personnel Management policy allows the payment of both an SES Bonus and a Meritorious Rank Award in the same calendar year if the combined amount of both awards does not exceed 35% of base pay.)

- C. In accordance with 5 U.S.C. 5307, the aggregate compensation of SES, ST, and SL employees during a calendar year may not exceed the rate payable for Level I of the Executive Schedule on the last day of that calendar year. This limitation is applied on a calendar year basis and in addition to base pay, performance awards, ranks awards, and comparability allowances, it also covers incentive awards, recruitment and relocation bonuses, retention allowances, and other forms of compensation.

### **13.5 DOCUMENTATION**

The Office of Human Resources Management will collect data from each operating unit on Presidential Rank awards, SES Bonuses, incentive awards and other related pay and performance information. Operating units must maintain sufficient records to respond to requests for data and for documentation supporting any award recommendations.

### **13.6 ST 3104; ADMINISTRATIVELY DETERMINED; SL-STAFF**

All cash awards for these employees must be submitted for review in accordance with Section 13.2 A through E. Performance related awards should be submitted following completion of the annual appraisal cycle. Multiple awards should be listed in priority order. Annual funding for these awards should not exceed 3% of the aggregate salaries of all such employees in a given operating unit.



## CHAPTER 14. EXAMINER-IN-CHIEF AND ATTORNEY-EXAMINER POSITIONS

### 14.1 BOARD OF PATENT APPEALS AND INTERFERENCES

- A. Background: On February 11, 1985, the Board of Patent Interferences and the Board of Appeals were merged to form the Board of Patent Appeals and Interferences. The function of this Board is to review adverse decisions of examiners upon applications for patents and determine priority and patentability of invention in interferences declared under Section 135(a) of 35 USC. Each appeal and interference shall be heard by at least three members, Examiners-in-Chief, of the Board of Patent Appeals and Interferences. Only the Board of Patent Appeals and Interferences has the authority to grant rehearings. Examiners-in-Chief are persons of competent legal knowledge and scientific ability appointed to the competitive service.
- B. Authority: The Secretary of Commerce is authorized to fix the per annum rate of basic compensation of each Examiner-in-Chief in the Patent and Trademark Office. This authority has been delegated to the CFO/ASA. These positions are exempt from the provisions of 5 USC 3104 and 5 USC 3133 and appointments are made through the authority of Title 35. Although Examiners-in-Chief have Civil Service status, the salary for their positions is administratively determined.
- C. Recruitment Procedures: The following procedures will be followed when recruiting for Examiners-in-Chief:
  - (1) The Director for Human Resources Management is responsible for approving operating unit executive recruitment plans, and has approved a standardized recruitment plan for Examiner-in-Chief positions.
  - (2) The PTO standardized recruitment plan consists of the following:
    - (a) Vacancy Announcement. A copy of the announcement must be submitted to the Office of Human Resources Management, where it will be transmitted to OPM after obtaining opening and closing dates.
    - (b) Position Description.

- (c) Qualification Standard. Only technical qualifications shall be entered into the qualification standard, as positions of Examiner-in-Chief are not managerial in nature.
- (d) Rating Plan.
- (e) Area of Consideration. OHRM must be notified if additional sources to the OPM distribution system, such as paid advertisement or notices to colleges or universities, are used.

D. Selection Procedures

- (1) The Chairperson, OERB, must:
  - (a) Convene the Board to rate and rank applicants; or
  - (b) Appoint a screening panel of equivalent subject matter specialists who will rate and rank applicants.
- (2) The OERB or screening panel shall prepare written recommendations on the qualifications of each applicant. The written recommendations, as a minimum, will rate the applicants into four categories: Not Qualified, Qualified, Well Qualified, or Highly Qualified.
- (3) A list of the Highly Qualified applicants and the OERB's written recommendations shall be submitted to the Appointing Authority for selection. For guidance on selection procedures, see Appendix, Section 4. Veterans preference will be adhered to insofar as practicable.

E. Procedures For Requesting Approval: The following material must be submitted to the Director for Human Resources Management for each proposed appointee for each Examiner-in-Chief position:

- (1) Approval Document - OPM Form 1390
  - (a) OPM Form 1390 is required for all executive appointment approval requests and must include citations in the Remarks Section as follows:
    - o The statement, "I approve the appointment of (Name of Appointee) to the executive position of (Title)," should

appear on initial appointments, reassignments, transfers and reinstatements.

- o The work address and telephone number must be included whenever a name is entered in the 1390.
  - o The vacancy announcement closing date must be included on the 1390 for all initial appointments of career appointments.
- (2) Qualifications Standard. The Qualifications Standard published in the approved vacancy recruitment plan will be forwarded with the approval document.
- (3) Certification Statement. The Chair, OERB must sign a statement that the proposed appointee or candidate's qualifications meet the technical qualifications contained in the Qualifications Standard.
- (4) Qualifications Analysis. A short qualifications analysis shall be prepared which compares the proposed appointee's technical qualifications against those technical qualifications contained in the approved Qualifications Standard for the position.
- (5) Application. The application must be signed and dated and clearly show the experience of the proposed appointee.
- (6) Biographical Sketch. A short biographical sketch will be developed for the proposed appointee.

F. Probationary Period

- (1) Each individual selected for appointment to an Examiner-in-Chief position is required to successfully complete a one year probationary period. Satisfactory completion of the prescribed probationary period is a prerequisite to continued service in the position.
- (2) Each career appointee who successfully completes the one year probationary period will receive a final appointment notification on Form CD-363b.
- (3) A career appointee who is serving a probationary period may be removed from the Board of Patent Appeals and Interferences at any time during the

probationary period for unacceptable performance or conduct. Board appointees who held a career or career-conditional appointment, or an appointment of equivalent tenure prior to appointment with the Board shall:

- (a) Receive written notification from the Appointing Authority at least 30 days before the effective date of removal action. The notification shall:
  - o state the inadequacies of the performance or conduct;
  - o indicate placement rights, if any; and
  - o provide the effective date of the action.
- (b) An employee who does not satisfactorily complete the probationary period will be assigned to a position of equivalent tenure for which he or she qualifies if one is available. An employee who is assigned to a position under this provision has no appeal rights.
- (c) Placement under this part shall not cause the separation or reduction in grade of any other employee.
- (d) An appointee placed under this part shall be entitled to receive pay at the same rate the employee had been receiving prior to appointment to the Board of Patent Appeals and Interferences or the rate of basic pay in effect for the position in which placed, whichever is higher, except that compensation under this section cannot exceed the tenth step of the grade in which placed.
- (e) If the career appointee does not qualify for any vacant positions within the Patent and Trademark Office or a position is not available, the appointee shall receive written notification from the Appointing Authority at least 30 days before the effective date of the removal action.

The notification shall:

- o state the inadequacies of the performance or conduct; and
  - o provide the effective date of the removal action.
- (4) A career appointee who is serving a probationary period and did not hold a career or career conditional appointment, or appointment of equivalent tenure as determined by OPM, immediately prior to appointment as an Examiner-in-Chief, shall receive written notification from the Appointing Authority at least 30 days before the effective date of the discharge action.

The notification shall:

- (a) state the inadequacies of the performance or conduct; and
- (b) provide the effective date of the discharge action.

G. Senior-Level and Related Pay Systems

See Chapter 5, Section 5.3B.

\_\_\_\_\_ H. Performance Appraisal System. All Examiners-in-Chief are subject to the General Workforce Appraisal System of the Department of Commerce.

I. Reduction-in-Force. In the event of a reduction-in-force, the Department's policy covering executive positions will be followed, as outlined in Chapter 9.

J. Travel to First Post of Duty. These positions have been determined to be shortage category positions and the payment of travel and transportation expenses in accordance with appropriate travel regulations is authorized depending upon circumstances and the availability of funds.

K. Adverse Actions. Members of the Board of Patent Appeals and Interferences are subject to the procedures pertaining to career civil service employees established by Chapter 75 of title 5 of the United States Code.

## 14.2 TRADEMARK TRIAL AND APPEAL BOARD

A. The Trademark Trial and Appeal Board (TTAB) is responsible for hearing and deciding adversary proceedings involving interfering applications, oppositions to registration,

cancellations, and concurrent use proceedings and for hearing and deciding appeals for final refusals of trademarks. The members of the Board hear and decide ex parte cases on appeal and inter parte cases as provided by statute. Section 3 of title 35 of the United States Code provides that members of the TTAB each be paid at a rate not to exceed the maximum rate of basic pay payable for GS-16 of the General Schedule.

- B. Authority. 15 U.S.C. 1067 states: "The Trademark Trial and Appeal Board shall include the Commissioner, the Deputy Commissioner, the Assistant Commissioners, and members appointed by the Commissioner. Employees of the Patent and Trademark Office and other persons, all of whom shall be competent in trademark law, shall be eligible for appointment as members." 35 U.S.C. 3(e) provides "members of the Trademark Trial and Appeal Board of the Patent and Trademark Office shall each be paid at a rate not to exceed the maximum rate of basic pay payable for GS-16 of the General Schedule under Section 5332 of Title 5."
- C. Recruitment Procedure
- (1) The Director, Office of Human Resources Management, is responsible for approving operating unit executive recruitment plans, and has approved a standardized recruitment plan for the positions of TTAB members.
  - (2) The PTO standardized recruitment plan consists of the following:
    - (a) Vacancy Announcement. A copy of the announcement must be submitted to OHRM for transmission to OPM after obtaining opening and closing dates.
    - (b) Position Description.
    - (c) Qualification Standard. Only technical qualifications shall be entered into the Qualification Standard as the positions of members of the TTAB are not managerial in nature.
    - (d) Rating Plan
    - (e) Area of Consideration. OHRM must be notified if additional sources to the Federal Job Opportunities Board, such as paid advertisement or notices to colleges and universities, are to be used.
- D. Selection Procedures. The selection procedure outlined in 14.1.D will be followed.

- E. Procedures for Requesting Approval. The procedure for requesting approval outlined in 14.1.E will be followed.
- F. Trial Period
  - (1) Each individual selected for appointment as a member of the TTAB is required to successfully complete a one-year trial period. Satisfactory completion of the prescribed trial period is a prerequisite to continued service in the position.
  - (2) Each appointee who successfully completes the one-year trial period will receive a final appointment notification on Form CD-364b.
  - (3) A member of the TTAB serving a trial period may be removed at any time during the trial period for unacceptable performance or conduct. The procedures followed will be those normally used for the removal of attorneys from the excepted service.
- G. Senior-Level and Related Pay Systems

See Chapter 5, Section 5.3B.
- H. Performance Appraisal System. All TTAB members are subject to the General Workforce Appraisal System of the Department of Commerce.
- I. Reduction-in-Force. In the event of a reduction-in-force, provisions in effect for attorney positions in the excepted service will be applied.
- J. Travel and First Post of Duty. These positions have been determined to be shortage category positions and the payment of travel and transportation expenses in accordance with the appropriate travel regulations is authorized depending upon the circumstances and the availability of funds.
- K. Adverse Actions. The provisions of Chapter 75 of Title 5 of the United States Code applicable to the excepted service will be applied.

## **CHAPTER 15. U.S. DEPARTMENT OF COMMERCE SENIOR EXECUTIVE SERVICE RECERTIFICATION PLAN**

### **15.1 AUTHORITY**

Under Sec. 506 of the Ethics Reform Act of 1989 (Public Law 101-194, November 30, 1989), Senior Executive Service (SES) career appointees are subject to recertification by their agencies. [Title 5 U.S.C. 3393a] [5 CFR 214, 317, 359, 842]

### **15.2 OBJECTIVE**

SES recertification ensures that the performance of career appointees demonstrates the excellence needed to meet the goals of the Senior Executive Service.

### **15.3 RELATIONSHIP TO ANNUAL PERFORMANCE APPRAISAL PROCESS**

The SES recertification process and the agency annual performance appraisal process are complementary but separate. While the annual appraisal looks at how well the executive has met the specific standards for his or her position for the year, the recertification process looks at the executive's performance over a period of three years. At the highest levels of Government management occupied by SES members, it often is not possible to fully judge the performance of an individual in as short a time span as one year since the impact of an executive's activities may not be known until a later time.

### **15.4 COVERAGE**

- A. SES career employees who have been continuously employed in the SES for 156 weeks preceding the end of the recertification period are subject to recertification. This period includes any service as an SES noncareer or limited appointee. It also includes service in any agency.
- B. One or more breaks in SES service of a total of 6 months or less do not interrupt the 156 weeks of continuous employment. A break is defined as a time period during which the SES career employee was not being officially counted against the agency's SES position allocation.
- C. SES career appointees who are on extended assignment or absence from their positions at the time of recertification are subject to recertification, generally, as long as they are officially occupying an SES position at the end of the



recertification period as a career appointee and meet the 156 week length of service requirement.

- D. This recertification plan does not apply to SES noncareer or limited appointees. Nor does it apply to former SES career appointees who took Presidential appointments at Executive Level V or higher with Senate confirmation and elected to retain SES benefits.

## **15.5 RECERTIFICATION PERIOD**

- A. The initial recertification period shall end on September 30, 1991, coincident with the end of the annual performance appraisal period. Subsequent recertification shall take place every third calendar year thereafter. September 30 shall serve as the date for calculating the 156-week employment period.
- B. If an executive is recertified in another agency and then transfers to Commerce during the calendar year, the executive is not subject to recertification in Commerce.
- C. If an executive transfers from another agency during the calendar year and no recertification decision was made in that agency, a recertification decision must be made in Commerce. All necessary relevant information on the executive's performance during the recertification period, in addition to performance ratings completed, will be requested of the executive's previous agency.

## **15.6 STANDARD FOR RECERTIFICATION**

- A. The career appointee must perform at the level of excellence expected of a senior executive. Excellence means that the executive has demonstrated over the recertification period that he or she has achieved excellence in:
  - (1) Planning for, substantially advancing, and attaining Presidential, agency, or organizational goals and objectives that required a sustained superior effort;
  - (2) Taking specific initiatives that advanced a major policy and/or significantly improved delivery of services;
  - (3) Taking the necessary actions to ensure the achievement of a quality product in a timely manner; and
  - (4) Making significant technical, scientific, or professional contributions.

- B. Also, if applicable to the responsibilities of the senior executive, excellence is demonstrated by:
- (1) Achieving substantial savings in the execution of programs under his or her direction;
  - (2) Maintaining the high quality and effectiveness of programs under his or her direction with reduced resources; and/or
  - (3) Providing strong leadership to enhance the development, utilization and achievements of subordinate personnel, including achievement of equal employment opportunity goals.

#### **15.7 RECERTIFICATION RECOMMENDATION AND DETERMINATION PROCEDURES**

- A. Recommendation by the Supervising Official
- (1) The supervising official of the career appointee shall submit to the operating unit Performance Review Board, a recommendation, on the form provided at the end of this plan, whether the career appointee's performance justifies recertification as a senior executive. The recommendation shall be based on the executive's overall performance during the recertification period in relation to the standard for recertification in paragraph F, including consideration of such factors as the following:
    - (a) The appointee's SES performance ratings for the 3 preceding years. SES career appointees do not necessarily have to have received annual performance ratings above Fully Successful to be recertified, nor do Fully Successful ratings guarantee recertification.
    - (b) Any award or other recognition received by the executive. These include awards from both inside the government (e.g. Presidential rank awards and superior accomplishment incentive awards) and outside the government. Awards recognizing performance over a period of years that are received during the recertification period even though some of the achievements recognized may have occurred before the recertification period are included. Also included are awards received after the recertification period, but before the recertification determination, if the award recognizes performance that took place during the recertification period.

- (c) Any developmental activities of the executive. These include professional, educational, or self-developmental activities. Supervising officials should consider funding availability and the stage of the executive's career, that is, long term executive vs. newly appointed executive, when evaluating the extent to which an executive participates in developmental activities.
  - (d) Significant accomplishments on task forces or Boards outside of program responsibilities; reputation in field of expertise as reflected by speaking engagements and publications; SES pay increases and bonuses when they are specifically related to performance.
- (2) The factors identified above should be used as a measure of whether the standard for recertification has been met in relation to the written performance requirements for the career appointee's senior executive position. Supervising officials may not make a recommendation solely on the basis of performance ratings.
- (3) There is no specific length of time that an official must serve as an executive's supervisor before making a recertification determination.
- (4) Prior to making a recommendation, supervising officials may request, or the executive may provide, a written statement of accomplishments from the executive in relation to the standard for recertification.
- (5) If the supervising official recommends recertification, no written justification is required. However, a recommendation proposing conditional recertification or no recertification shall include a narrative justification. The narrative should specify those aspects of the standard for recertification that have not been met. Supervising officials should contact their servicing human resources management office for technical advice and assistance prior to preparing such a narrative.
- (6) The executive shall be given a copy of the recommendation provided on the form at the end of this plan. He/she shall be requested to acknowledge receipt of the form, and advised of the right to submit to the Performance Review Board (PRB), a statement of accomplishments and other documentation giving evidence of the quality of his/her performance in relation to the standards set forth in paragraph F. The statement of accomplishments provided to the PRB may be the same as that provided in paragraph d. above, or amended at the executive's discretion.

- (7) The executive may request a review of the recommendation (if other than to recertify) by an official in a position higher than the supervising official, unless there is no one at a higher level within the Department, prior to the recommendation being forwarded to the PRB. If the executive requests a higher level review, he/she must have the opportunity to respond in writing to the recommendation and have the response provided to the reviewer. The reviewer may comment on and must make a recommendation regarding the initial recommendation, but may not change it. A copy of the reviewer's comments and recommendation must be provided to the executive, the supervising official, and the PRB, and follow the case to the deciding official. This review will be performed by the Departmental Performance Review Board (DPRB) for executives who are supervised directly by the senior operating unit appointing authority.
- (8) The recertification form and any appropriate written documentation, (i.e. the executive's statement of accomplishments if provided to the supervising official; a narrative justification for a recommendation other than to recertify) shall be forwarded to the Performance Review Board. Documentation for the annual performance appraisal process may be forwarded along with the recertification materials to facilitate most efficient use of PRB time. Separate documentation is required for each process.

**B. Recommendation by the Performance Review Board**

- (1) More than one-half of the members of the Board shall consist of SES career appointees. Board members may not take part in any deliberations or actions regarding recommendations on their own recertification, or of those of immediate supervisors and subordinates.
- (2) After receiving and reviewing the recommendation of the supervising official and any appropriate written documentation (provided by the executive, the supervisor, or a reviewing official) the Board shall submit to the senior appointing authority in the operating unit a recommendation, on the form provided at the end of this plan, whether the appointee should be recertified, conditionally recertified, or not recertified.
- (3) If the PRB needs more information to make its recommendation, it may request additional documentation from the supervising official or the executive, and/or request that either appear before the Board.
- (4) If the Board proposes to recommend conditional recertification or no

recertification, the appointee shall:

- (a) be notified in writing, specifying the Board's rationale, in sufficient detail, for its proposed recommendation. If the PRB chooses to use the same rationale as provided by the supervising official, it need only indicate its concurrence on the supervising official's justification, and have the Chair sign the appropriate block on the recertification documentation form;
  - (b) have the opportunity to appear before the Board prior to the forwarding of the recommendation to the senior appointing authority in the operating unit. The appointee shall be given a minimum of 5 days advance notice of the proposed scheduled appearance. If the appointee requests, he/she may be given a reasonable amount of official time to prepare for his or her appearance.
- (5) If the Board recommends recertification, it may also recommend that the appointee's rate of basic pay be increased to a higher ES pay rate. If the Board recommends conditional recertification, it may also recommend that the appointee's rate of basic pay be reduced to the next lower ES pay rate. These recommendations are to be documented on the recertification determination form. A rate adjustment recommendation should take into consideration any proposal for adjustment made as part of the current performance appraisal cycle. Only one adjustment may be made during a 12 month period.
  - (6) In addition to its recommendation, the Board shall provide the senior operating unit appointing authority with the recommendation from the supervising official and any information received from the appointee and the reviewing official (if the executive requested higher level review).
  - (7) A copy of the recertification determination form reflecting the Board's final recommendation shall be forwarded to the appointee.

C. Recommendation by the senior operating unit appointing authority

- (1) If, after receiving and reviewing the recommendations of the supervising official and the Performance Review Board (including any information received from the appointee), the senior operating unit appointing authority determines that the appointee's performance during the three preceding years demonstrates the excellence expected of a senior executive and warrants recertification, he/she will record this recommendation on the recertification determination

form along with any pay rate adjustment recommendation (again, consistent with any current performance appraisal recommendation).

- (2) If the senior operating unit appointing authority determines that the appointee's performance has not demonstrated the excellence expected of a senior executive, he/she shall recommend that the appointee be conditionally recertified or not be recertified, and record this recommendation on the recertification determination form.
- (3) Written reasons must be provided for any recommendation to conditionally recertify or not recertify if these have not been provided by either the supervising official or the Performance Review Board. If the PRB had not provided the executive an opportunity for a personal appearance because it had made a positive recertification recommendation, the senior operating unit appointing authority will provide the executive an opportunity to make a presentation in writing and/or in person before taking further action. Notification and official time provisions are the same as those provided in section 15.7B(4).
- (4) Determinations will not be based on a prescribed distribution of how many or what percentage of executives will be recertified, conditionally recertified, or not recertified.

D. Determination by the Deputy Secretary or CFO/ASA

- (1) The CFO/ASA shall review all recommendations from the supervising official, the PRB, and the senior operating unit appointing authority and will be the deciding official for executives determined to meet the standard for recertification. He/she will also decide on any recommended pay rate increases. For executives in the Office of the Inspector General (OIG), and those who report to the CFO/ASA, recommendations will be submitted to the Deputy Secretary who will be the deciding official for determining recertification. Under the Inspector General Act, the IG sets the pay for OIG executives.
- (2) A determination that the appointee's performance warrants recertification will be recorded on the recertification determination form along with the appropriate annotation if a positive pay rate change is decided upon. The completed form will be returned to the operating unit human resources management office for filing.
- (3) Written reasons must be provided for any recommendation or decision to

conditionally recertify or to not recertify a career appointee. The documentation for such recommendations will be reviewed by the CFO/ASA, but must be approved by the Deputy Secretary. The reasons must be specific enough so that the executive will be able to understand why the action was taken, and adequate to support a case if the executive appeals a removal action. The Deputy Secretary or CFO/ASA need not provide additional reasons if he or she agrees with those of the recommending official(s) and deems them sufficient.

- (4) If a decision to conditionally recertify or not recertify is being considered and the executive has not had an opportunity for a personal appearance because all previous deliberations have considered only a recommendation to recertify, the Deputy Secretary or CFO/ASA will provide an opportunity to the executive to make a presentation in writing and/or in person before taking further action.

## **15.8 RECERTIFICATION DETERMINATIONS**

### **A. Decision to Recertify**

- (1) If the CFO/ASA or the Deputy Secretary determines that the appointee's performance warrants recertification, the appointee shall continue in the SES.
- (2) The appointee's rate of basic pay may not be reduced at the time of recertification.
- (3) If the decision is made to increase the appointee's rate of basic pay, the statutory restriction that an SES member's pay level may be changed only once in a 12 month period remains applicable.

### **B. Decision to Conditionally Recertify**

- (1) If the Deputy Secretary determines that the appointee's performance warrants conditional recertification, the appointee:
  - (a) Shall be notified in a letter enclosing the completed recertification determination form and necessary supporting documentation.
  - (b) Shall remain a career appointee in the SES.
  - (c) Shall be subject to continuing close review of the appointee's performance by the supervising official in coordination with the Operating Unit Executive Resources Board (OERB).

- (d) Shall be subject to a performance improvement plan developed by the supervising official, subject to the approval of the OERB, and provided to the appointee within 30 days of his/her notification of conditional recertification. The performance improvement plan should include a description of the deficiencies in the executive's performance, what constitutes satisfactory completion of the plan, a statement of the support and assistance to be provided by the supervising official, and any training initiatives planned. It shall conform with performance standards the executive is required to attain during the period. Periodic progress review discussions shall be held and documented at least once, and at additional times if warranted.
  - (e) May, if the Deputy Secretary so determines, be reduced to the next lower ES pay rate, once 12 months have elapsed since the appointee's last pay adjustment.
  - (f) May not appeal to the Merit Systems Protection Board, as the law does not provide such a right.
- (2) At the end of the 12 months following conditional recertification, the operating unit shall initiate a new recertification determination. The process for making the new determination shall be the same as for the initial recertification decision, including review and recommendation by the operating unit Performance Review Board.
- (a) The individual shall be retained in the SES if recertified and shall have any reduction in ES pay level made under paragraph H-2-a-(5) restored as of the beginning of the first pay period following recertification when 12 months have elapsed since the pay reduction.
  - (b) The individual shall be removed from the SES if not recertified at the end of the 12-month period following the conditional recertification.

C. Decision Not to Recertify

- (1) If the Deputy Secretary determines that the appointee's performance does not warrant recertification or conditional recertification, the appointee shall be removed from the SES in accordance with applicable law and regulation. (5 CFR 359)
- (2) The appointee shall be notified in writing before the effective date of the



action. If the appointee has completed the SES probationary period, or was not required to serve a probationary period, the notice shall be at least 30 calendar days before the effective date of the removal from the SES.

- (3) The notice shall include the completed recertification determination form and advise the appointee of:
  - (a) The basis for the action.
  - (b) The appointee's placement rights provided under 5 CFR 359.701-705. The position to which the appointee will be assigned shall be identified either in the advance notice or in a supplementary notice issued no later than 10 calendar days before the effective date of the action.
  - (c) The appointee's right to appeal to the Merit Systems Protection Board, including the time limit for appeal, the office to which an appeal should be sent, and that there is no provision for a stay in the removal action pending the appeal process.
  - (d) The effective date of the removal from the SES.
  - (e) When applicable, the appointee's eligibility for immediate discontinued service retirement, in lieu of placement rights, with no annuity reduction based on age (CSRS) and eligibility for an annuity supplement regardless of age (FERS).
- (4) Removal from the SES as a result of not being recertified may not be made effective within 120 days after the appointment of a new Secretary of Commerce, or within 120 days after the appointment in the Department of the career appointee's most immediate supervisor who is a noncareer appointee and has the authority to remove the career appointee.

#### **15.9 RECERTIFICATION PLAN CONSULTATION, APPROVAL, AND DISTRIBUTION**

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- A. In accordance with regulations, Commerce has developed the recertification procedures described in this plan in consultation with its SES career appointees.
- B. Changes to the Department's Recertification Plan require OPM approval.

- C. Copies of the approved plan, and any subsequent changes, will be provided to all agency SES appointees.

#### **15.10 TRAINING**

Before the beginning of each recertification determination process, executives who supervise career SES appointees, and PRB members, will be given training on the objectives and procedures of the recertification process. Also, during this same time period, Commerce will inform SES career appointees about the agency's recertification plan provisions.

#### **15.11 RECORDS**

Recertification documentation shall be maintained in the appointee's Employee Performance Folder (EPF) for 5 years from the date of the recertification determination. (If an individual is conditionally recertified, documentation for the final recertification determination shall be maintained for 5 years from the date of the conditional recertification.) EPF's shall be maintained in accordance with provisions in the SES Performance Appraisal Plan. Information contained in the EPF is protected under the provisions of the Privacy Act.

#### **15.12 REPORTS AND EVALUATION**

Commerce will report to the Office of Personnel Management (OPM) such information, and take such corrective action as OPM may direct as a result of its oversight and evaluation responsibilities.

U.S. DEPARTMENT OF COMMERCE  
SENIOR EXECUTIVE SERVICE RECERTIFICATION CY 199\_\_

Name of Executive:

Position Title and Organization:

Current Pay Rate: ES-\_\_\_\_\_

Recertification Period From: \_\_\_\_\_

To: \_\_\_\_\_

Standard for Recertification

1. The career appointee must perform at the level of excellence expected of a senior executive. Excellence means that the executive has demonstrated over the recertification period that he or she has achieved excellence in:
  - a. Planning for, substantially advancing, and attaining Presidential, agency, or organizational goals and objectives that required a sustained superior effort.
  - b. Taking specific initiatives that advanced a major policy and/or significantly improved delivery of services.
  - c. Taking the necessary actions to ensure the achievement of a quality product in a timely manner.
  - d. Making significant technical, scientific, or professional contributions.
2. Also, if applicable to the responsibilities of the senior executive, excellence is demonstrated by:
  - a. Achieving substantial savings in the execution of programs under his or her direction.
  - b. Maintaining the high quality and effectiveness of programs under his or her direction with reduced resources.
  - c. Providing strong leadership to enhance the development, utilization and achievements of subordinate personnel, including achievement of equal employment opportunity goals.

The following recommendations/decision are based on an assessment of the executive's overall performance during the recertification period in relation to the above Standard for Recertification stipulated in law, regulation, and agency written procedures.

Supervising Official's Recommendation:

Recertify \_\_\_\_\_

Conditionally Recertify \_\_\_\_\_

Not Recertify \_\_\_\_\_

Recommend pay rate adjustment to ES-\_\_\_\_\_

No pay rate adjustment recommended \_\_\_\_\_

In making these recommendations, I have given due consideration to the executive's overall performance during the recertification period, including performance ratings, awards and other recognition, developmental activities, and other relevant qualitative factors specified in the agency SES recertification plan. If the above recommendation is to conditionally recertify or not recertify, I have attached the required written justification specifying the standard for recertification not met and other relevant supporting documentation.

Signature and Title

Date

U.S. DEPARTMENT OF COMMERCE  
SENIOR EXECUTIVE SERVICE RECERTIFICATION CY 199\_\_  
(Continued)

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Performance Review Board (PRB) Recommendation:

Recertify\_\_\_\_\_ Conditionally Recertify\_\_\_\_\_ Not Recertify\_\_\_\_\_

Recommend pay rate adjustment to ES-\_\_\_\_\_ No pay rate adjustment recommended \_\_\_\_\_

In making these recommendations, we have given due consideration to the executive's overall performance during the recertification period, including performance ratings, awards and other recognition, developmental activities, other relevant qualitative factors specified in the agency SES recertification plan, and the supervising official's recommendation. If the above recommendation is to conditionally recertify or not recertify, we have provided the executive the rationale for our proposed recommendation, an opportunity to appear before the PRB and/or provide it a written statement of accomplishments, and have attached the required written justification and other relevant supporting documentation.

\_\_\_\_\_  
PRB Chairperson's Signature

\_\_\_\_\_  
Date

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Appointing Authority's Recommendation:

Recertify\_\_\_\_\_ Conditionally Recertify\_\_\_\_\_ Not Recertify\_\_\_\_\_

Pay rate adjustment to ES-\_\_\_\_\_ No pay rate adjustment \_\_\_\_\_

In making these determinations, I have given due consideration to the executive's overall performance during the recertification period, including performance ratings, awards and other recognition, developmental activities, other relevant qualitative factors specified in the agency SES recertification plan, and the supervising official's and PRB's recommendation. If the above determination is to recommend conditional recertification or not to recertify, the executive has been provided the rationale for such action, an opportunity to appear before me or the PRB and/or provide a written statement of accomplishments. I have attached the required written justification and other relevant supporting documentation.

\_\_\_\_\_  
Signature and Title

\_\_\_\_\_  
Date

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Agency Head (or designee) Decision:

Recertify\_\_\_\_\_ Conditionally Recertify\_\_\_\_\_ Not Recertify\_\_\_\_\_

Pay rate adjustment to ES-\_\_\_\_\_ No pay rate adjustment \_\_\_\_\_

In making these decisions, I have given due consideration to the executive's overall performance during the recertification period, including performance ratings, awards and other recognition, developmental activities, other relevant qualitative factors specified in the agency SES recertification plan, and the supervising official's and PRB's recommendation. If the above decision is to conditionally recertify or not recertify, the executive has been provided the rationale for such action, an opportunity to appear before me or the PRB and/or provide a written statement of accomplishments. I have attached the required written justification and other relevant supporting documentation.

\_\_\_\_\_  
Signature and Title (if designee)

\_\_\_\_\_  
Date

U.S. DEPARTMENT OF COMMERCE

**SENIOR EXECUTIVE SERVICE RECERTIFICATION CY 199\_\_**  
**(Continued)**

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FOR OPTIONAL USE (to be provided by the human resources management office):

Annual SES Performance Ratings

19\_\_\_\_\_  
Performance Rating Level

19\_\_\_\_\_  
Performance Rating Level

19\_\_\_\_\_  
Performance Rating Level

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**Executive's Acknowledgment of Supervising Official's Recommendation:**

\_\_\_\_I have received a copy of my supervising official's recommendation and wish to submit a statement of accomplishments to the Performance Review Board.

\_\_\_\_I have received a copy of my supervising official's recommendation and DO NOT wish to submit a statement of accomplishments to the Performance Review Board.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

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**Awards and Other Recognition**  
**(continue on back if necessary)**

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**Developmental Activities**  
**(continue on back if necessary)**

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**Other Relevant Qualitative Factors**  
**(continue on back if necessary)**

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